Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| National Association of State Utility | ) | CG Docket No. 04-208 |
| Consumer Advocates' Petition for | ) | |
| Declaratory Ruling Regarding | ) | |
| Truth-In-Billing and Billing Format | ) | |

**NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES' REPLY COMMENTS**

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## TABLE OF CONTENTS

**SUMMARY**

On March 30, 2004, the National Association of State Utility Consumer Advocates ("NASUCA") filed a petition with the Commission,[1] in the Commission's Truth-in-Billing ("TIB") proceeding,[2] requesting that the Commission issue a declaratory ruling addressing interexchange carriers' ("IXCs") and commercial mobile radio service ("CMRS" or "wireless") carriers' increasing use of monthly line items. The Commission referred NASUCA's petition to its Consumer and Government Affairs Bureau, which docketed the proceeding as CG 04-208 and released a public notice establishing dates for the submission of initial and reply comments. At NASUCA's request, the reply comment deadline was subsequently extended by 15 days.[3]

Initial comments were filed by numerous parties. Comments in support of NASUCA's petition were filed by 16 parties, as well as 19 individual consumers. Comments opposing NASUCA's petition were filed by 18 parties,[4] and it is to these parties' opposing comments that NASUCA's reply comments are chiefly directed.

In its Petition, NASUCA seeks to have the Commission address, in the context of its TIB proceeding, the growing use by both IXCs and CMRS carriers of monthly line items – fees and surcharges that recover the carriers' operating costs, including costs of complying with various government regulatory programs. NASUCA asserted that these line items violate the

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[1] *In the Matter of National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing,* CG Docket No. 04-208, Petition (filed March 30, 2004) ("Petition").

[2] *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170.

[3] *In the Matter of National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing,* CG Docket No. 04-208, 04-1820, Order, (rel. June 24, 2004).

[4] The following persons filed comments opposing NASUCA's petition: AT&T Corporation ("AT&T"); AT&T Wireless Services, Inc. ("AWS"); BellSouth Corporation ("BellSouth"); The Coalition for a Competitive Telecommunications Markets ("Competitive Coalition"); Cingular Wireless LLC ("Cingular"); the CTIA – The Wireless Association ("CTIA"); Global Crossing North America, Inc.; IDT America, Corp. ("IDT"); Leap Wireless International, Inc. ("Leap"); MCI, Inc. ("MCI"); The National Telecommunications Cooperative Association ("NTCA"); Nextel Communications, Inc. and Nextel Partners, Inc. ("Nextel"); Rural Cellular Association ("RCA"); Sprint Corporation ("Sprint"); United States Cellular Corporation ("US Cellular"); The United States Communications Association ("USCA"); The United States Telecom Association ("USTA"); the Verizon telephone companies ("Verizon"); and Verizon Wireless ("VZW").

Commission's *TIB Order*[5] and Sections 201 and 202 of the Communications Act of 1934, as amended ("Act")[6] because, among other things: (1) they are misleading and deceptive, confusing consumers with respect to the origin of the charges in question; (2) they are misleading and deceptive, confusing consumers with regard to the prices consumers pay for the services they receive; (3) they are misleading and deceptive, in violation of the *TIB Order*, in that many imply that they are required by the government when in fact they have never been expressly mandated or authorized by any governmental agency; (4) they are misleading and deceptive in that carriers' advertising does not disclose these hidden fees and charges; (5) they are unreasonable billing practices in that they bear no demonstrable relationship to the costs of government regulation they recover; and (6) they are anti-competitive in that carriers are able to mask their economic inefficiencies while they advertise low usage-based and monthly rates for telecommunications service.

Comments opposing NASUCA raise numerous arguments, factual, procedural and legal, and request that the Commission deny NASUCA's Petition. The Commission should reject the commenters' arguments and issue the ruling sought by NASUCA, at least with respect to so-called "regulatory" line items. If the Commission determines that its current *TIB Order* does not address other line items utilized by carriers, NASUCA requests that the Commission initiate a Notice of Proposed Rulemaking to receive comments regarding whether other line items should also be restricted.

The commenters' arguments in opposition to the Petition should be rejected for several reasons including the following: *First*, the commenters mischaracterize the ruling NASUCA seeks in its Petition. Commenters wrongly suggest that NASUCA seeks to ban the use of all line

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[5] *See In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72 (rel. May 11, 1999) ("*TIB Order*").
[6] 47 U.S.C. §§ 151 *et seq.*

items or that NASUCA seeks to have carriers hide all their costs in one lump sum rate. NASUCA seeks to prohibit all line items and surcharges that are not expressly mandated or authorized by federal, state or local government. *Second*, contrary to commenters' arguments otherwise, the *TIB Order* did not authorize the line items in question; instead the *TIB Order* – and subsequent Commission orders – authorized carriers to recover costs associated with complying with a narrow set of Commission regulatory programs. The line items in question were not widely employed at the time the Commission's orders were issued and were not considered in any of the relevant Commission orders. *Third*, the carriers have failed to show that their line items are not, in fact, misleading or deceptive, nor have the carriers shown that the line items are reasonably related to the regulatory compliance costs they purport to recover. *Fourth*, the restriction on the use of line items sought in the Petition does not violate the carriers' First Amendment rights. The restrictions NASUCA seeks are either regulation of carriers' conduct (*i.e.*, their billing practices) or, if a regulation of speech, constitute a permissible regulation of commercial speech. *Fifth*, the proposed restriction on the use of line items NASUCA seeks is not an improper shifting of the burden of taxation.

The line items and surcharges identified by NASUCA constitute a burden on consumers and an impediment to the development of competition. The Commission should rule immediately to prohibit all line items and surcharges that are not expressly mandated or authorized by federal, state or local government. If the Commission decides that it cannot deal with all identified line items and surcharges within the context of the TIB docket, it should expeditiously initiate a new rulemaking to consider all line items and surcharges that fall outside the scope of the TIB proceeding.

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**NATIONAL ASSOCIATION OF STATE UTILITY**
**CONSUMER ADVOCATES' REPLY COMMENTS**

Pursuant to the Federal Communications Commission's ("Commission") May 25, 2004, public notice, as modified by subsequent order, the National Association of State Utility Consumer Advocates ("NASUCA") hereby submits its reply comments in this proceeding. For the reasons set forth herein, the Commission should enter an order granting the relief sought by NASUCA in its March 30, 2004, petition for a declaratory ruling. The Commission should prohibit carriers from imposing line item charges and fees on customer bills, unless those charges and fees are expressly mandated or authorized by federal, state or local governments.[7]

## I. OPPONENTS MISREPRESENT NASUCA'S PETITION.

As the Commission is well aware, in its March 30, 2004, petition NASUCA sought a declaratory ruling prohibiting all line-items and surcharges on customer bills, unless such surcharges and line-items were expressly mandated or authorized by federal, state or local government. Many commenters have misrepresented NASUCA's position, or argued that the relief which NASUCA seeks cannot be granted in the pending Truth-in-Billing ("TIB") docket.[8] The Commission should ignore these misrepresentations and provide a remedy to the proliferation of unnecessary and misleading surcharges and line-items on customers' bills.

[7]NASUCA Petition for Declaratory Ruling, p. 68 (hereinafter "Petition").
[8]*In the Matter of Truth in Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72 (May 11, 1999) (hereinafter "TIB").

However, to the extent that all of the relief requested by NASUCA cannot be fashioned within the TIB proceeding, the Commission should expeditiously initiate a new notice to complement actions taken in this docket.

### A. NASUCA's Petition Does Not Seek To Prohibit Line Items Expressly Mandated Or Authorized By Federal, State Or Local Law.

Some commenters argue that NASUCA seeks to preclude carriers from recovering sums authorized by the Commission and other agencies to fund various regulatory programs.[9] These commenters cite such Commission-authorized charges as the federal universal service fund assessment, and the subscriber line charge ("SLC") which incumbent local exchange carriers ("ILECs") are authorized to recover from end-users.[10] It is obvious that such commenters either did not understand NASUCA's petition or are seeking of mischaracterize it.

The controversy – to the extent one exists – is a matter of semantics. NASUCA *did* use the term "expressly mandated" in connection with those line items that carriers should be allowed to continue recovering as separate line items.[11] In every instance, NASUCA should have said "expressly mandated *or authorized*" in order to make it clear that line items recovering the Commission-established universal service fund contribution or the SLC would not be prohibited. That was NASUCA's intent, even if that intent was not made perfectly clear in its petition. NASUCA mixed the terms "mandated," "imposed," "authorized" and "allowed" in distinguishing between those line items that it was condemning and those it was not. For example, NASUCA wrote: "To be clear, NASUCA is not asking the Commission to overturn prior decisions *allowing* carriers to recover specific assessments *mandated* by regulatory action through line item charges."[12] In discussing the *Contribution Order*,[13] NASUCA noted that the

[9] ATT Comments, pp. 2-3; RCA Comments, pp. 7-9.
[10] *Id.*
[11] See, *e.g.*, Petition, p. 1. However, NASUCA specifically used the term "authorized" in connection with the amounts carriers should be allowed to recover in such line items. *Id.*, p. 68.
[12] Petition, p. vii; 24, 42

Commission "changed the manner in which carriers were *allowed* to recover the assessment *imposed* to cover contributions to federal universal service programs."[14] Similar language abounds in NASUCA's petition.[15]

This clarification – that its petition seeks to prohibit all regulatory line items not expressly mandated or authorized by federal, state or local government action – puts to rest commenters' concerns that many line items authorized by the Commission would be prohibited by the declaratory ruling NASUCA seeks.

### B. NASUCA's Petition Does Not Seek To Have All Line Items Rolled Into One Lump Rate.

In yet another exaggerated reading of NASUCA's petition, commenters assert that NASUCA's petition would require carriers to lump all their costs, including government-imposed taxes and fees, into one lump rate.[16] The commenters' mischaracterization of NASUCA's petition cannot be justified by any minor confusion that may have stemmed from NASUCA's failure to use the phrase "expressly mandated" without always including the term "authorized." Carriers should be allowed to recover federal, state and local taxes and fees by means of line-items or surcharges when such line items or surcharges are expressly mandated or authorized by federal, state or local governments. Nothing in NASUCA's petition compels any other result.

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[13] *In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (Dec. 13, 2002) (hereinafter "Contribution Order").

[14] *Id*., p. 8 ("imposed" was not entirely accurate, since the Commission does not impose the USF contribution – rather it authorizes carriers to recover that assessment through line item charges).

[15] *See, e.g., id*., p. 30 (TalkAmerica's TSR Administrative Fee appears calculated to be confused with the TRS charges that states and the Commission have *authorized* carriers to recover); p. 32 (OneStar's Primary Carrier Fee appears intended to be confused with the PICC *allowed* by the Commission; "the surcharges imposed by these carriers appear to be recovering *government-authorized* charges"); pp. 38-39 ("Commission should disallow use of such monthly fees . . . under the guise of *government-mandated or imposed* charges"); 42 ("with regard to [NANP or TRS programs], the Commission's rules and orders *permit* carriers to recover their costs associated with such programs"); p. 45 (CMRS carriers' charges are unreasonable "since those charges purport to recover costs that the government has never *authorized* the carriers to recover from end users, or greatly over-recover amounts *authorized* by the Commission"); p. 48 ("Although the Commission *authorized* carriers to recover their costs of implementing number portability early on. . ."); p. 56 ("the Commission has never *authorized* carriers to impose subscriber line items to recover their CALEA compliance costs").

[16] USTA Comments, pp. 5-6; Verizon Comments, p. 9.

NASUCA did not seek a declaratory ruling from the Commission banning carrier line items and surcharges that are expressly mandated or authorized by federal, state or local governments. Yet that is precisely what some of the parties filing comments in opposition to its petition assert in order to justify their opposition. Further, NASUCA did not seek to exclude those line items that recover contributions to government programs mandated by regulatory action, yet again, that is what numerous commenters claim. Finally, NASUCA did not suggest in its petition that all carrier costs should be rolled into one lump sum rate in its petition. Nonetheless, this is what a number of commenters claim.

In short, many commenters misrepresent the goals and scope of NASUCA's petition in order to construct a "straw man" petition that they could then portray as both unreasonable and illegal. The Commission should not be swayed by such facile efforts, and should grant NASUCA's petition.

## II. WHAT NASUCA SEEKS IS BOTH CONSISTENT WITH THE COMMISSION'S RULINGS IN THE TIB DOCKET AND OTHER PROCEEDINGS, IS REASONABLE AND IS ULTIMATELY PRO-COMPETITIVE AND PRO-CONSUMER.

Several commenters object to NASUCA's petition on procedural grounds, asserting that the Commission has already authorized the line items at issue in the *TIB Order* and other orders. They argue that NASUCA is really seeking a reversal of the Commission's rules in order to prohibit what the Commission has previously allowed.[17] The commenters note that the purpose of a declaratory ruling is to terminate a controversy or remove uncertainty, and then assert there is no controversy to terminate or uncertainty to remove.[18]

Contrary to these assertions, NASUCA's petition seeks a Commission declaration to do just that, terminate a controversy and remove uncertainty. However, should the Commission

[17] Verizon Comments, p. 10; VZW Comments, p. 7; Sprint Comments, pp. 4-7; ATT Wireless Comments, pp. 4-5; Cingular Comments, p. 2.
[18] USTA Comments, pp. 4-5; AT&T Comments, pp. 5-6; CTIA Comments, pp. 22-24; Sprint Comments, pp. 4-7; BellSouth Comments, pp. 5-6; Verizon Wireless Comments, pp. 6-8.

agree that NASUCA's petition seeks to have the Commission repeal, amend or modify its existing rules, or address line items outside the ambit of the TIB proceeding, then the Commission should treat the petition as a request to initiate a rulemaking regarding the regulatory line items in question. The importance of the issues raised in NASUCA's petition, coupled with the large number of comments supporting it, warrants an expeditious decision on the merits of the issues rather than delay or dismissal on strictly procedural grounds.

### A. NASUCA's Petition Seeks To Resolve Uncertainty Or Terminate A Controversy.

The central premise of parties' arguments that NASUCA's petition is procedurally improper is the notion that the Commission has authorized such line items in orders entered in the TIB docket and other proceedings.[19] Having authorized carrier line items in its TIB rules, the commenters argue, NASUCA's petition improperly seeks to reverse those rules through a declaratory ruling.

Contrary to the commenters' assertions, the Commission has never addressed the regulatory line item charges that are included in NASUCA's petition. The Commission has, to be sure, spoken to carriers' ability to impose surcharges on their customers for such things as USF contributions (including administrative costs associated with the USF assessment), costs to implement local number portability and subscriber line charges. The Commission has not, however, authorized the recovery of costs associated with multiple regulatory programs, taxes and other miscellaneous operating costs, in a single line item charge to carriers' customers.

#### 1. The *TIB Order* Did Not Authorize the Line Items at Issue.

In the *TIB Order*, the Commission addressed the broader issue of consumer confusion regarding charges on monthly telephone bills, in addition to dealing with slamming and cramming. Consumer confusion regarding monthly charges was not an insignificant problem.

[19] ATT Comments, pp. 19-20; Verizon Comments, pp. 4-5.

The Commission noted that "virtually every state and consumer advocacy group that commented," as well as several members of Congress, identified consumer confusion as a growing concern that the Commission should address.[20] Likewise, the Federal Trade Commission ("FTC") argued that Commission intervention "is necessary to help consumers avoid 'falling prey' to unscrupulous service providers who hide or mislabel unauthorized charges on consumers' telephone bills."[21]

As discussed in the Petition, the Commission adopted three broad, "truth-in-billing" principles to ensure that consumers receive "thorough, accurate, and understandable bills" from their telecommunications carriers. The third principle, "full and non-misleading billed charges" – in addition to the "minimal, basic guidelines" adopted by the Commission ". . . designed to prevent the types of consumer fraud and confusion evidenced in the tens of thousands of complaints we have received"[22] - lie at the heart of the controversy in this proceeding. The guidelines addressing billing descriptions and standardized labels for charges resulting from federal regulatory action are particularly relevant.[23]

Several commenters assert that, in the *TIB Order*, the Commission previously rejected any suggestion that line items could to be prohibited, under any circumstances.[24] The Commission's rulings in the *TIB Order* are not nearly as sweeping and conclusive as the commenters suggest, however. For example, commenters cite paragraph 50 of the *TIB Order* in asserting that the Commission authorized, for all time, any line items the carriers see fit to

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[20] *Id*., ¶ 4.

[21] *Id*.

[22] *Id*., ¶5.

[23] *Id*., ¶¶ 37-65; *see* 47 C.F.R. § 64.2401(b) & (c).

[24] AT&T Comments, pp. 6-9; AWS Comments, pp. 3-4; Cingular Comments, pp. 3-5; Leap Comments, pp. 6-7; MCI Comments, pp. 5-6; Nextel Comments, pp. 7-11; Sprint Comments, pp. 4-7; Verizon Comments, pp. 3-6; VZW Comments, pp. 3-5.

impose – so long as those charges are described and identified in a manner that comports with the Commission's guidelines regarding billing descriptions and organization.[25] Here is what the Commission actually wrote:

> We find that the substantial record on this issue supports our adoption of guidelines to address consumers' confusion and potential for misunderstanding concerning the nature of these charges. Specifically . . . we adopt our proposal that require carriers to identify line item charges associated with federal regulatory action through a standard industry-wide label and provide full, clear and non-misleading descriptions of the nature of the charges, and display a toll-free number associated with the charge for consumer inquiries. While we adopt guidelines to facilitate consumer understanding of these charges and comparison among service providers, we decline the recommendations of those that would urge us to limit the manner in which carriers recover these costs of doing business.[26]

The Commission was not speaking prospectively regarding all line items associated with any regulatory action. Instead the Commission was focused "particularly on three types of line items that have appeared on consumers' bills," namely line items associated with contributions to the federal universal service fund, subscriber line charges and costs associated with providing local number portability.[27]

The fact that the regulatory action taken by the Commission in the *TIB Order* was more limited in scope than the commenters suggest is illustrated in other portions of the Commission's *TIB Order*. For example, the Commission noted that "[t]he record in this proceedings supports our concern that the failure of carriers to label and accurately describe *certain line item charges* on their bills has led to increased consumer confusion about the nature of *these changes* [*sic*]."[28] The limited scope of the Commission's *TIB Order* was further clarified in that portion of the order adopting specific guidelines for standardized labels. The Commission wrote:

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[25] Verizon Comments, p. 4.
[26] TIB Order, ¶ 50.
[27] *Id.*, ¶¶ 51-52.
[28] *Id.*, ¶ 53 (emphasis added).

> In the Notice,[29] we generally sought comment on the methods by which the nature and purpose of *these charges* could be clarified. *We adopt the guidelines proposed in our Notice . . . that line-item charges associated with federal regulatory action* should be identified through standard and uniform labels across the industry. We agree that standardized labels will promote consumers' ability to understand their bills, thus facilitating their ability to compare rates and packages among competing providers. Such comparisons are very difficult when carriers choose different names for *the same charge*.[30]

NASUCA does not believe that the Commission, without more specific language, intended that the line items addressed in the *TIB Order* extended well beyond the specific regulatory programs cited by the Commission in both the TIB NPRM and *TIB Order*. *Other types of line items were not even mentioned.* Certainly the discussion of the SLC, federal universal service assessments and local number portability costs would not, on its face, extend to any federal or regulatory program – of any sort – that might impose costs on a carrier's provision of service, nor to any non-regulatory costs. This same limitation extends to the other portion of the *TIB Order* opponents of NASUCA's petition cite – paragraph 56.

In paragraph 56, the Commission wrote that it "decline[d] to take a more prescriptive approach as to how carriers may recover *these costs*" – meaning costs associated with the charges that were the focus of the Commission's order.[31] The Commission opted not to adopt specific suggestions regarding these charges – such as combining all of them into one charge, or separating out any fees associated with regulatory action, or requiring per-minute rates that include all fees associated with the service. Instead, the Commission wrote:

> We decline *at this time* to mandate such requirements, but rather prefer to afford carriers the freedom to respond to consumer and market forces individually, and consider whether to include *these charges* as part of their rates, or to list the

[29] *I/M/O Truth-In-Billing and Billing Format*, CC Docket No. 98-170, FCC 98-232, Notice of Proposed Rulemaking (rel. Sept. 17, 1998) ("*TIB NPRM*").
[30] *TIB Order*, ¶ 54 (emphasis added). The *TIB NPRM* referred specifically to access charges and universal service fund charges. *TIB NPRM*, ¶¶ 2, 10, 21, 25-26.
[31] *Id.*, ¶ 56.

charges in separate line items.[32]

Even if the commenters' suggestion is correct – that the Commission allowed carriers to utilize line items to recover any costs, in any fashion or amount they desired – the above-quoted language made it clear that the Commission's determination was not set in stone. Declining a more prescriptive approach in 1999 does not prevent the Commission from resolving uncertainties with "grab bag" regulatory line items carriers have begun to use – either in a declaratory ruling or in a rulemaking. Nor, as discussed below, do the other Commission orders cited in opposition to NASUCA's petition compel a broader reading of the *TIB Order*'s scope and effect.

### 2. The *Contribution Order* Did Not Authorize Carriers to Impose Any Line Item They Wish Under the Guise of "Regulatory Compliance."

Commenters' claim that the Commission authorized all regulatory line items in its *Contribution Order*[33] finds no support in the Commission's order. In the *Contribution Order,* the Commission specifically authorized carriers to recover their administrative costs associated with the collection of universal service charges through their rates or other line items.[34] Specifically, the Commission wrote:

> Contributing carriers still will have the flexibility to recover their contribution costs through their end-user rates if they so choose and to recover any administrative or other costs they currently recover in a universal service line-item through their customer rates *or through another line item*.
>
> * * *
>
> [W]e clarify that *we do not believe it appropriate for carriers to characterize*

[32] *Id.* (emphasis added).

[33] AT&T Comments, pp. 19-20; Competitive Coalition Comments, pp. 7-8; Cingular Comments, p. 2-4; Nextel Comments, pp. 7-11; RCA Comments, p. 3; Sprint Comments, pp. 6-7; Verizon Comments, pp. 4-5; VZW Comments, p. 5 & Fn. 10-11; *see In the Matter of Federal State Joint Board on Universal Service*, Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13, 2002) ("*Contribution Order*").

[34] *Id.*, ¶¶ 54-55.

> *these administrative and other costs as regulatory fees or universal service charges after April 1, 2003*. These costs, in our view, are no different than other costs associated with the business of providing telecommunications service and may be recovered through rates *or other line item charges*.[35]

Commenters – and many carriers – apparently read the last quoted sentence to mean that *all* costs associated with the business of providing telecommunications service may be recovered through rates or other line item charges. The Commission's order is not nearly as broad as the commenters suggest, however.[36]

Instead the *Contribution Order* merely allows "these costs" (*i.e.*, administrative costs associated with the collection of universal service charges) to be recovered as line items, so long as they are not characterized as regulatory fees or universal service charges. As such, the *Contribution Order* is a natural extension of the limited authorization provided to carriers in the *TIB Order*, namely allowing them to recover their universal service assessments through a line item charge.

Unlike carriers' interpretation of the *Contribution Order*, NASUCA's reading is consistent with the limited issues the Commission was addressing in that order.[37] Nowhere in the *Contribution Order* did the Commission hint that it intended to take such sweeping action as to authorize carriers to use line items to recover *any* costs, whether related to regulatory action or

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[35] *Id.,* ¶¶ 40, 54 (emphasis added).

[36] In its petition, NASUCA noted that the Commission's language in the *Contribution Order* appeared to be an open invitation to carriers to impose line items for any cost to provide telecommunications service and sparked the flood of regulatory line items seen now. NASUCA Petition, p. 9. NASUCA does not agree with the carriers' reading of the *Contribution Order*, nor does NASUCA believe the Commission intended such a broad interpretation of its order – especially in light of the narrowness of its *TIB Order*.

[37] *See Contribution Order*, ¶¶ 1-6, 10-13. For example, the Commission's order took "interim measures to maintain the viability of universal service in the near term. *Id.*, ¶ 1. It also concluded that "carriers may not recover their federal universal service contribution costs through a separate line item that includes a mark-up above the relevant contribution factor beginning April 1, 2003." *Id.*, ¶ 2. The Commission further noted that it "initiated this proceeding to consider alternatives or modifications to a revenue-based system" for funding universal service. *Id.* Finally, the Commission noted its adoption of rules to improve customers' understanding of their telephone bills in the TIB Order, noting that this order focused on "three types of line-item charges that result from federal regulatory action: (1) universal service-related fees; (2) subscriber line charges; and (3) local number portability charges." *Id.*, ¶ 13.

not.[38] To the extent the Commission's language in the *Contribution Order* suggests otherwise, the Commission should make it clear such was not the Commission's intent. Furthermore, even if the Commission endorses the commenters' interpretation of the *Contribution Order*, many of the line items in question are still inappropriate since the charges are characterized as regulatory fees, if not in name then in the manner in which the line items' origins and purposes are described.

### 3. The *LNP 3rd R&O* Did Not Authorize Carriers to Impose Any Line Item They Wish Under the Guise of "Regulatory Compliance."

Several commenters assert that the Commission authorized them to recover their costs of providing local number portability in line item surcharges or fees.[39] NASUCA never suggested otherwise.[40] NASUCA's complaints regarding wireless ("CMRS") carriers' recovery of number portability costs are not that the CMRS carriers are imposing a line item charge to recover their direct costs of providing number portability, but rather: (1) their imposition of such line items before their customers could utilize this service; (2) their lumping number portability costs together with various other "regulatory" programs' costs; and (3) the fact that the line items being charged appear to be over-recovering wireless carriers' direct costs of implementing portability. Nothing in the CMRS carriers' comments address these concerns.

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[38] Sprint suggests that the Commission eliminated any uncertainty over the lawfulness of regulatory line items in paragraph 55 of the Contribution Order. There the Commission wrote:

> Carriers that are not rate regulated by this Commission, namely interexchange carriers, CMRS providers, and competitive local exchange carriers, will have the same flexibility that exists today to recover legitimate administrative and other related costs. In particular, such costs can always be recovered through these carriers' rates or through other line items. . . . Nothing in this Order modifies our existing Truth-in-Billing requirements.

Contribution Order, ¶ 55. However, the Commission's *Contribution Order* was narrowly focused on the administrative costs associated with the collection of universal service contributions, which the TIB Order had previously made clear could be legitimately recovered via line items.

[39] Cingular Comments, p. 5; Nextel Comments, pp. 8-9; Verizon Comments, pp. 4-5; VZW Comments, p. 5.

[40] Petition, pp. 46-54.

### 4. The Commission's E911 Rulings Similarly Do Not Authorize the Line Items at Issue.

NASUCA asserted that some CMRS carriers may be recovering costs to implement E911 through surcharges, in contravention of the Commission's directive that such costs be recovered "in their rates."[41] In response, Sprint claims that NASUCA is incorrect, that the Commission did not restrict wireless carriers to recovering their E911 implementation costs in their rates, and that the Commission's "Wireless Bureau (later affirmed by the Commission) in fact held the very opposite."[42] Sprint is half right: the Wireless Bureau's Chief *did* suggest that "as telecommunications carriers whose rates are not regulated, wireless carriers have the option of covering these Phase I costs through their charges to customers, either through their prices for service or through surcharges on customer bills."[43]

Sprint is wrong, however, regarding the second half of its assertion: the Commission *did not* endorse the Bureau Chief's suggestion. Here is what the Commission actually wrote:

> Finally, we reject Petitioners' contention that the Bureau's decision constitutes a "new [Bureau-created] policy" of assigning costs based on a wireless carrier's ability to recoup those costs from its customers. *The Bureau's observation that wireless carriers can recoup their costs from their customers is not, and was not, determinative of the cost allocation question.* It did, however, track the Commission's comments in the *E911 Second Memorandum Opinion and Order* that removal of the carrier cost recovery requirement in section 20.18(j) would have no negative impact on carriers because they could recoup their costs from customers through surcharges or increased rates.[44]

Even as it correctly ruled that the Wireless Chief's suggestion was not determinative of

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[41] Petition, p. 58, *citing In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, CC Docket No. 94-102, FCC 99-352, ¶ 54 (rel. Dec. 8, 1999) ("*Wireless E911 2d R&O*").
[42] Sprint Comments, pp. 15 fn. 32, 17-18 Fn. 41.
[43] *Re: King County, Washington Request Concerning E911 Phase I Issues,* Letter from Thomas J. Sugrue to Marlys Davis (May 7, 2001).
[44] *In the matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems: Request of King County, Washington*, Order on Reconsideration, CC Docket No. 94-102, FCC 02-146, ¶ 19 (rel. July 24, 2002), *citing Wireless E911 2d R&O,* ¶ 40.

the cost allocation issue, the Commission made one significant error: the portion of the *Wireless E911 2d R&O* supposedly tracked by the Wireless Chief speaks only of CMRS carriers recovering their Phase I E911 costs through their rates – it makes no mention of surcharges.[45] NASUCA believes the Commission's error in its July 24, 2002, order was inadvertent and did not represent a significant modification of the *Wireless E911 2d R&O*.

### B. There Is No Reason Why CMRS Carriers Should Be Excluded from the Consumer Protection Measures Concerning Full and Non-Misleading Billing Disclosures and Standardized Labeling.

#### 1. The Rationale Underlying the *TIB Order* and Other Commission Orders Applies to CMRS Carriers.

With regard to CMRS providers, the Commission concluded that some of its TIB "may be inapplicable or unnecessary in the CMRS context."[46] However, the Commission indicated that it intended "to require CMRS carriers to comply with standardized labels for charges resulting from Federal regulatory action, if and when such requirements are adopted."[47] In addition, the Commission made it clear that "there are two rules that we think are so fundamental that they should apply to all telecommunications common carriers," namely: (1) that the service provider associated with each charge must be clearly identified on the customer's bill, and (2) that each bill prominently display a telephone number that customers may call, free-of-charge, to question any charge on the bill.[48] The Commission stated that it expected:

> [T]o apply the same rule to both wireline and CMRS carriers, however, because we believe that labels assigned to charges related to federal regulatory action should be consistent, understandable, and should not confuse or mislead

[45] NASUCA notes that Sprint makes a detailed argument that surcharges are not "rates" but rather are "rate elements." Sprint Comments, pp. 15, ftn. 32; 17-18, ftn. 41. NASUCA agrees generally that surcharges are something other than rates.

[46] *Id*., ¶ 17.

[47] *Id*., ¶ 18.

[48] *Id*., ¶ 17.

customers.[49]

Finally, the Commission noted that, although several of the guidelines it adopted in the *TIB Order* did not apply to wireless carriers, "such providers remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202 of the [1934] Act, and our decision here in no way diminishes such obligations as they may relate to billing practices of CMRS carriers."[50]

Taken together, these principles and guidelines, the Commission believed, "represent fundamental principles of fairness to consumers and just and reasonable practices by carriers."[51] Neither wireline nor wireless carriers are exempt from the application of these principles and guidelines.

**2. Barring CMRS Carriers' Non-Mandated Line Items Does Not Violate Section 332(c)(3) of the Act.**

Several CMRS carriers[52] contend that the Commission should deny the NASUCA petition because it is an impermissible attempt to regulate CMRS carriers' rates or rate structures, violates the Commission's 1994 decision to forbear from regulating wireless rates under 47 U.S.C. §205, and violates the prohibition on CMRS rate regulation in 47 U.S.C. §332(c)(3).[53] The Commission should reject these arguments. Regulation of billing and advertising practices is not a regulation of the carriers' charges.

The CMRS carriers' arguments have been presented to, and rejected by, federal courts in

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[49] *Id.*, ¶ 18.

[50] *Id.*, ¶ 19.

[51] *Id.*

[52] *See* Nextel Comments, p. 26; Cingular Comments, p. 18; VZW Comments, p. 11.

[53] Nextel, Cingular, AWS and VZW. Section 332 states, in relevant part, "Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services…." 47 U.S.C. § 332(c)(3)(A).

recent years**.** For example, a federal district court rejected the very same arguments presented by Nextel, holding that Missouri's Attorney General could pursue state law claims of deceptive descriptions in advertising and consumer bills in state court because those claims were not preempted under Section 332(c).[54] Similar arguments raised by Cingular were rejected by the Seventh Circuit which wrote: "[C]laims [that] address not the rates themselves, but the conduct of [the wireless carrier] in failing to adhere to those rates [is] precisely the type of state law contract and tort claims that are preserved for the states under § 332 as the 'terms and conditions' of commercial mobile services."[55] In short, NASUCA's Petition concerns billing and advertising and is not preempted by Section 332(c)(3) or the Commission's decision to forbear.

## III. THE LINE ITEMS THAT ARE THE FOCUS OF NASUCA'S PETITION ARE MISLEADING, OFTEN DECEPTIVE, AND GENERALLY UNREASONABLE.

If consumers are going to be charged a monthly fee or surcharge to recover a carrier's costs, especially costs to comply with government regulation, both consumers and the government have an interest in the accuracy of the carrier's charge – not only the characterization, but also the amount. This principle cannot honestly be disputed. Despite the hue and cry commenters raise over their right to "advise consumers about the true cost of government regulation," and their assurance that the fees and disclosures meet or exceed the *TIB Order*'s requirements, the regulatory line items that NASUCA identified neither advise customers about the true cost of government regulation nor do they meet or exceed the *TIB Order*'s requirements. Other line items have even less rationale.

[54] *State ex rel Jeremiah W. Nixon v. Nextel*, 248 F. Supp.2d 885 (E.D. MO 2003).
[55] *Fedor v. Cingular Wireless*, 355 F.3d 1069, 1072-74 (7th Cir. 2004).

### A. The IXCs' Regulatory Line Items Do Not Meet Or Exceed The *TIB Order*'s Principles and Guidelines.

Some carriers go to great lengths to discuss the accuracy of their billing descriptions and disclosures, and the format and organization of their bills.[56] The carriers' efforts are unavailing. The Commission has already – in its *TIB Order* – spoken to the misleading and deceptive nature of lump sum surcharges and fees that seek to recover costs associated with numerous regulatory programs. On this very point, the Commission wrote:

> We believe that so long as we ensure that consumers are readily able to understand and compare these charges, competition should ensure that they are recovered in an appropriate manner. Moreover, we are concerned that precluding a breakdown of line item charges would facilitate carriers' ability to bury costs in lump figures. *Insofar as regulatory-related charges have different origins, and are applied to different service and provider offerings, we also question whether implementation of a lump-sum figure for all charges resulting from federal regulatory action could be presented in a manner which consumers could clearly understand the origin of such a charge*.[57]

The Commission's concerns about lump sum charges apply to the "regulatory" line items complained of by NASUCA. Consider the interexchange carrier's ("IXCs") regulatory line items. AT&T's "Regulatory Assessment Fee," for example, purportedly helps the company recover the following costs: "interstate access charges; regulatory compliance and proceedings costs and property taxes."[58] The costs purportedly recovered by AT&T's charge certainly have "different origins and application to different service offerings." Its customers have no way of ascertaining what "regulatory compliance and proceedings" are involved (federal, state or both, telecommunications regulation or every government regulation). Nor can AT&T's customers

[56] Nextel Comments, pp. 7-12; Leap Comments, pp. 8-10; AT&T Wireless Comments, pp. 5-6; Cingular Comments, pp. 12-22, VZW Comments, pp. 22-33.
[57] TIB Order, ¶ 56 (emphasis added). It is true that, in the next breath, the Commission "recognize[d] that consumers may benefit from a simplified total charge approach," and therefore encouraged industry and consumer groups to consider whether categorization and aggregation of charges would be advisable ( such as putting all line items associated with long distance service together and putting all line items associated with local service together). *Id.* The question whether a total charge approach truly offered benefits was never answered because a collaborative effort between industry and consumer groups was never undertaken.
[58] NASUCA Petition, pp. 12-13.

gauge the carrier's costs of regulatory compliance and proceedings from the name or description of the charge.

The other elements of AT&T's line item charge are equally mystifying. Take, for example, the interstate access charges AT&T's fee purportedly recovers. With the release of the Commission's *CALLS Order*,[59] ILECs' interstate access charges were greatly reduced and ILECs recover much of the revenue from those charges through their SLCs. Yet AT&T apparently now finds itself compelled to add a new fee to recover those reduced costs, which are clearly a direct cost of AT&T's service. This hardly comports with the expectations of consumers or regulators.

Other IXC line items referenced in NASUCA's petition suffer from the same TIB deficiencies. Sprint's "Carrier Cost Recovery Charge" recovers various costs "including . . . other regulatory compliance items, and certain property taxes."[60] Likewise MCI's "Carrier Cost Recovery Charge" recovers costs the company incurs "with regard to . . . federal regulatory fees" and to recover the company's expenses incurred "with regard to . . . universal service funds . . . ."[61] BellSouth's "Carrier Cost Recovery Fee" is identical to AT&T's fee, except BellSouth omits property taxes, but adds "billing expenses."[62]

### B. The CMRS Carriers' Line Items Do Not Meet Or Exceed The *TIB Order*'s Principles and Guidelines.

CMRS carriers appear to disagree whether, and to what extent, the *TIB Order* applies to them. Cingular and VZW recognize that the *TIB Order* applies to CMRS carriers as well as

[59] *In the matter of Access Charge Reform*, CC Docket No. 96-262 et al, *Sixth Report and Order in CC Docket No. 96-262and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45*, FCC 00-193 (May 31, 2000).
[60] NASUCA Petition, p. 13.
[61] *Id.*, p. 14. Presumably, MCI's Carrier Cost Recovery Charge incorporates the costs of administering the company's collection and remission of federal USF contributions, which was addressed in the Commission's Contribution Order. See *id.*, p. 8-9, citing Contribution Order, ¶¶ 40, 54. However, lumping these administrative expenses into a line items that recovers various other costs runs afoul of the concerns expressed by the Commission in the TIB Order, and the guidelines themselves.
[62] *Id.*, p. 15.

IXCs.[63] Cingular noted that the three principles set forth in the *TIB Order* apply to CMRS carriers and wireline carriers alike, and that three specific guidelines set forth in the *TIB Order* apply to CMRS carriers. VZW, however, claims that only two of the guidelines apply.[64]

Importantly, VZW also asserts that the *TIB Order*'s principle that bills contain full and non-misleading charges does not apply to CMRS carriers.[65] This is glaringly wrong. The *TIB Order* specifically provides that *all of its principles apply to both wireline and wireless carriers*.[66] Moreover, the Commission's full and non-misleading charges principle is the source of the guidelines that VZW admits apply to it (*i.e.*, clear identification of the service provider and toll free number for questions and disputes). If the principle did not apply to wireless carriers, then the guidelines implementing that principle should likewise not be applicable to CMRS carriers.

In contrast, Nextel and US Cellular imply that CMRS carriers are not constrained by the *TIB Order* in any way. Nextel claims that the Commission "specifically concluded that CMRS carriers . . . may recover their costs in any lawful manner, including through a non-misleading line item rate element" and that "nothing precludes [CMRS carriers] from recovering costs from their customers . . . through a separate rate element or item."[67] US Cellular claims the Commission "sought comment on whether the specific 'truth in billing' rules now applied to wireline carriers should also be applied to wireless carriers," but "declined to adopt such rule changes in the years since 1999, and specifically declined to do so in the 2002 [Contribution]

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[63] Cingular Comments, pp. 8-12; Nextel Comments, pp. 7-11; US Cellular Comments, pp. 4-5; VZW Comments, pp. 4-5.

[64] Cingular Comments, p. 8. These three guidelines, as NASUCA noted in its petition, are: (1) clearly identifying the name of the service provider associated with each charge; (2) prominent display of a toll free number customers may call with questions or disputes; and (3) identification of separate charges resulting from regulatory action via standardized labels. *Id.*, pp. 8-9. VZW claims only the first two guidelines apply to wireless carriers. VZW Comments, p. 5. This is an apparent error in reading the TIB Order.

[65] VZW Comments, p. 22.

[66] TIB ¶¶ 13; 17-18.

[67] Nextel Comments, p. 7. Later in its comments, Nextel does recognize that the TIB Order provides "general guidance on the manner in which carriers may recover their regulatory costs." *Id.*., p. 10.

Order." Further, US Cellular claims the Commission "found no reason to adopt general regulation of wireless bills in 1999 or in 2002, when it modified wireless billing practices with respect to universal service line items."[68]

US Cellular and Nextel are patently wrong in suggesting that the *TIB Order* does not constrain CMRS carriers from putting any line item they want, in any amount they want, on customers' bills. As NASUCA noted – and as Cingular and VZW concede – all the principles set forth in the *TIB Order* apply to CMRS carriers.[69] Moreover, at least some of the guidelines regarding full and non-misleading bills apply to wireless carriers. Likewise, the Commission made it clear that its decision not to apply all of the guidelines to CMRS carriers did not mean that its discussion in support of the other guidelines was irrelevant to the wireless industry. For example, the Commission wrote: "…notwithstanding our decision at this time not to apply these several guidelines to CMRS carriers, we note that such providers remain subject to the reasonableness and nondiscrimination requirements of section 201 and 202 of the 1934 Act."[70]

Finally, the Commission did not suggest that the wireless industry enjoyed an unconditional exemption in perpetuity from certain guidelines established in the *TIB Order*. Should the Commission conclude that conditions warrant clarifying the *TIB Order* – as NASUCA and other commenters believe is necessary to address the spreading abuse of line items and surcharges – it clearly may make its guidelines applicable to CMRS carriers.

With regard to Cingular's and VZW's arguments, the Commission's discussion of what types of line items could reasonably be expected to mislead or confuse consumers demonstrates that the carriers' billing practices do not meet or exceed the *TIB Order*'s principles and guidelines. The CMRS carriers' line items, especially "regulatory" line items like those

[68] US Cellular Comments, p. 4.
[69] NASUCA Petition, pp. 33-34.
[70] TIB, ¶19.

employed by wireline carriers, recover costs purportedly associated with a grab bag of regulatory programs. For example, AWS describes its regulatory line item as helping to fund its compliance "with various government mandated programs which may not be available yet to subscribers."[71] ALLTEL's line item "recoup[s] expenses incurred to provide government mandated services"[72] while Cingular's "help[s] defray its costs incurred in complying with obligations and charges imposed by State and Federal telecom regulations."[73] Leap and Nextel, at least, identify specific regulatory programs in the description of their regulatory line items – Nextel noting that its fee is "charged for *one or more* of the following: E911, number pooling and wireless number portability"[74] – while Leap advises that its fee "recoup[s its] costs for complying with regulations *related to* number pooling and local number portability."[75]

Line items like those employed by AWS, ALLTEL and Cingular are vague and ambiguous – both qualities that were condemned by the Commission in the *TIB Order*. On this point, the Commission wrote:

> In the Notice, we observed that telephone bills often contain vague or inaccurate descriptions of the services for which the customer is being charged. For example,, many complaints we have received involve charges identified on local telephone bills simply as "monthly fee" or "basic access" without further explanation. The record in this proceeding persuades us that unclear or cryptic telephone bills exacerbate consumer confusion, as well as the problems of cramming and slamming.
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> * * *
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> We contemplate that sufficient descriptions will convey enough information to enable a customer reasonably to identify and to understand the service for which the customer is being charged. Conversely, descriptions that convey ambiguous or vague information, such as, for example, charges identified as "miscellaneous," would not conform to our guideline.[76]

[71] NASUCA Petition, p. 18-19.
[72] *Id.*, p. 19.
[73] *Id.*, p. 20.
[74] *Id.*, p. 21 (emphasis added).
[75] *Id.*, p. 20.
[76] TIB Order, ¶¶ 39-40.

Like the wireline carriers' line items that recover costs associated with "regulatory compliance, the CMRS carriers' line items, especially those that purport to recover costs associated with various government programs are, practically speaking, no different from a line item entitled "Miscellaneous."[77] Such a line item violates the *TIB Order*.

Many of the CMRS carriers' line items fail to comply with the *TIB Order* in yet another respect, namely the suggestion that the charges are mandated by the government. In the *TIB Order*, the Commission indicated that:

> A full, accurate and non-misleading description of the charge would be fully consistent with our [standardized label] guideline. In contrast, we would not consider a description of that charge as being "mandated" by the Commission or the federal government to be accurate.[78]

Each of these carriers explains that its regulatory line item is to fund compliance with "government *mandated* programs" or "*obligations imposed* by the federal government."

The carriers might argue that their descriptions of the line items indicate that the "programs" are mandated, but do not suggest that the "charges" are mandated by those programs. This hypertechnicality does not serve the carriers well. They imply that the Commission required accurate disclosure that there is a program, but allowed carriers to give the false impression that the charges are mandated. The nuances of the argument would certainly be lost on the average consumer. The Commission should not endorse carriers' confusing and misleading consumers; it should reject them.

Some of the comments opposed to NASUCA's petition actually support NASUCA's contention that the carriers' regulatory line items are misleading and that the carriers' disclosures

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[77] In fact, a line item entitled "miscellaneous" would be preferable to one entitled "federal regulatory compliance fee" or such like. A line item described as "miscellaneous" is objectionable because it fails to provide any information about what the consumer is being billed for. This is, the Commission rightly noted, bad. Line items that recover a grab bag of operating costs under the moniker "regulatory fee" are worse. Consumers still don't know what they're being billed for but they're led to believe that it's the government's fault. With these regulatory line items consumers are not only left confused, they are also misled and invited to direct the ire that results toward "Big Brother" rather than the carrier that opts to recover its operating costs through a line item.

[78] *Id.*, ¶ 57.

and disclaimers do not cure their deficiencies under the *TIB Order*. For example, the Coalition for a Competitive Telecommunications Market ("Competitive Coalition"), made up of resellers of IXC services, opposed NASUCA's petition in favor of the Commission improving its consumer education programs and more aggressive enforcement actions. The Competitive Coalition noted, however, that consumers should not be expected to rely on carriers' literature regarding their charges.[79] NASUCA agrees. Moreover, the Competitive Coalition suggested that if consumers rarely consult carrier websites, it is "unimaginable" that they peruse Commission orders regarding what regulatory costs are allowed to be recovered through line items. Again, NASUCA agrees. Finally, the Competitive Coalition suggested that consumer confusion regarding carriers' regulatory line items stemmed from the sheer number of charges appearing on consumer bills.[80] Yet again, NASUCA agrees.

### C. The Commenters Ignore The *Advertising Joint Policy*.

All the commenters asserting that carriers' regulatory line items are not misleading or deceptive ignore the relevance of the *Advertising Joint Policy*[81] cited in NASUCA's petition in assessing whether a carrier's communication with its customers is misleading or deceptive.[82] AT&T, the Competitive Coalition and VZW at least address the *Advertising Joint Policy*, but wrongly claim it is irrelevant.

AT&T asserts that: (1) the *TIB Order* suggested that the *Advertising Joint Policy*'s "truth in advertising" criteria would not apply to the billing practices in question because it rejected adding "safe harbor language" or other descriptive language on customer bills; (2) the

[79] Competitive Coalition Comments, p. 3.
[80] *Id*. To be fair, on the last point the Competitive Coalition suggests that the sheer number of regulatory line items appearing on customer bills is the "direct result of government action." *Id.* Here NASUCA parts company with the Competitive Coalition's observations.
[81] *In the Matter of Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*, File No. 00-72, FCC 00-72, Policy Statement (rel. March 1, 2000) ("*Advertising Joint Policy*").
[82] Petition, pp. 39-42.

Commission chose not to apply the *Advertising Joint Policy*'s standards when it issued its *TIB Reconsideration Order*;[83] and (3) the TIB standards are more stringent than those contained in the Advertising Joint Policy and AT&T meets both.[84] AT&T's arguments are unavailing.

NASUCA did not cite the *Advertising Joint Policy* for specific "safe harbor language" that should be in carriers' bills, but rather for the standards the Commission should consider in determining whether a consumer is likely to be misled or deceived by carriers' regulatory line items. As for the Commission's "decision" not to address the *Advertising Joint Policy* in its *TIB Reconsideration Order*, omitting a reference to a policy hardly constitutes a rejection of its principles in the billing context. As the Commission made clear in that decision, "[t]his Order addresses only those new arguments raised in the petitions for reconsideration" – none of those arguments raised any issues that would have been impacted by the *Advertising Joint Policy*.[85]

Finally, AT&T contradicts itself when it claims that applying the *Advertising Joint Policy*'s "net impression" standard to each bill message would be "regulatory intervention of the worst kind."[86] Obviously, any particular bill message is subject to review under the *TIB Order*. AT&T presumably understands and accepts that. What it cannot accept, apparently, is use of the "net impression" standard for determining whether a consumer is likely to be misled by any particular bill message. AT&T's argument proves the point: the "net impression standard" is necessary to help the Commission determine whether a reasonable consumer is likely to be confused, misled or deceived by a carrier's regulatory line item charge.

VZW and the Competitive Coalition both assert that the *Advertising Joint Policy* simply

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[83] *In the Matter of Truth-in-Billing and Billing Format*, Order on Reconsideration, CC Docket No. 98-170, FCC 00-111 (rel. March 29, 2000) ("*TIB Reconsideration Order*").
[84] AT&T Comments, pp. 20-23.
[85] *TIB Reconsideration Order*, ¶ 2. The arguments on reconsideration dealt with: (1) identifying new service providers; (2) identifying deniable and non-deniable charges; (3) bundled services; (4) clearly identifying providers; (5) provision of toll-free numbers; and (6) the Commission's regulatory flexibility analysis. *Id.*, ¶¶ 3-12.
[86] AT&T Comments, pp. 22-23.

does not apply because it addressed advertising, not billing.[87] This is a distinction without a difference. Both activities involve communications from carriers to customers (or potential customers) regarding their rates and services. What makes an advertisement misleading or deceptive is very likely to make a billing statement misleading or deceptive.

The distinction VZW and the Competitive Coalition attempt to draw between advertising and billing is ironic because it contradicts commenters' argument that the Commission review the constitutionality of NASUCA's proposed restriction on billing practices pursuant to Supreme Court decisions dealing with advertising. If advertising and billing are both commercial speech between carriers and customers, subject to the same constitutional protections, then the same standard for determining when that communication is misleading or deceptive should be applied in both contexts.

### D. Other Arguments Defending "Regulatory" Line Items Ring Hollow.

Commenters put forth several other arguments specifically attempting to justify carriers' regulatory line items. None of these arguments withstand any critical analysis.

#### 1. The Telecommunications Industry's Costs of Regulatory Compliance Are Not So Unlike Other Industries' Costs.

Several commenters claim that regulatory line items are common in competitive industries. BellSouth notes that other industries use line items to recover specific types of expenses (airline security fees, cable franchise fees, shipping and handling fees). Sprint claims that it is not unusual for companies to include surcharges as part of their overall prices, especially for costs they cannot control (airline fuel surcharges, car dealership delivery fees, natural gas companies' purchased gas charges).[88] There are some critical points that undercut the carriers' assertions.

[87] VZW Comments, pp. 27-28; Competitive Coalition, p. 9.
[88] BellSouth Comments, pp. 10-11; Sprint Comments, p. 12.

Car dealerships and mail order sellers refer to their surcharges as "delivery fees" or "shipping and handling" – they do not suggest to buyers that the government is responsible for either the fee or the fee amount. Likewise, airline fuel surcharges are called just that, "fuel surcharges;" the airlines do not try to pin the blame on government. The carriers also overlook that fact that many of the surcharges used in other industries require government approval. Airlines recover "passenger facility charges" (not security fees) from their passengers, but airlines do not establish or set the charges – airport authorities and the Federal Aviation Administration ("FAA") do.[89] Similarly, natural gas companies recover purchased gas increments or assessments only after their respective utility commissions have approved the increments and their amount.[90] Cable franchise fees similarly pass through local government franchise fees imposed on cable companies.

CTIA offers its own, irrelevant observation in defense of carriers' regulatory line items. CTIA claims that, "unlike unregulated entities," carriers have no control over the timing of costs associated with meeting government requirements.[91] This is not true. All businesses are regulated, to some degree, by the government.[92] Likewise, no business controls the timing or the costs of government regulations that apply to them. Yet other business' customers do not see the

[89] Airports must apply for, and receive, FAA approval to impose and use "passenger facility charges," and as part of the approval process, the airport authority must meet with users (*i.e.*, airlines) to negotiate the amount of the charge and the purposes to which it is applied (such charges are typically used to fund airport construction, improvements or security). Only after the charge has been approved by the FAA may airlines impose it on their passengers. Also unlike the regulatory line items at issue, airlines act as collection agents for these charges, passing them back to fund the airport's projects (for information regarding airport passenger facility fees, see http://www.faa.gov/arp/financial/pfc/pfcreg.cfm?ARPnav=pfc).

[90] *See, e.g.*, Rules for the Government and Construction of the Filing of Tariffs, 150 W. Va. Code State Reg. §2-13.2.

[91] CTIA Comments, p. 3.

[92] Virtually all manufacturers must comply with OSHA regulations. All businesses that emit air pollutants or discharge pollutants into waters of the United States must comply with often extremely onerous federal and state regulations controlling air and water pollution. Businesses seeking to build new or expand existing facilities often need to comply with comprehensive land use, historic preservation or environmental protection regulations. All publicly-held corporations must comply with federal and state securities laws. Restaurants comply with local health regulations.

same plethora of line items that appear on carriers' monthly telephone bills, especially line items that are misleadingly attributed to, but not mandated by, government

For its part, NTCA suggests that regulatory line items are warranted "because there are new regulations and unfunded mandates adopted on a daily basis."[93] However, NTCA fails to identify any new regulations or unfunded mandates that would account for the rapid, recent growth of regulatory line items.[94] Furthermore, at least one carrier, Sprint, admitted in proceedings before the West Virginia commission that all of the regulatory costs being recovered in its Carrier Cost Recovery Charge are costs of doing business that Sprint has incurred for years and which were, until September 2003, recovered "to the maximum extent possible through usage charges or monthly recurring charges, or both."[95]

**2. Carriers Regulatory Line Items are Hardly Public Service Announcements.**

**a. Regulatory line items are imposed not to educate consumers but to enhance carriers' profits.**

Some commenters suggest that carriers are motivated to use regulatory line items by their desire to inform their customers of the true costs of government regulation. NASUCA has reason to be skeptical.

For example, the West Virginia consumer advocate challenged both AT&T's Regulatory Assessment Fee and Sprint's Carrier Cost Recovery Charge before the state commission.[96] Sprint's pleadings and responses to the consumer advocate's discovery made it quite clear that profit, not customer education, was the motivating factor in establishing its fee. For example, in response to the consumer advocate's show cause petition, Sprint stated that it:

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[93] NTCA Comments, p. 3.

[94] NASUCA is unaware of any new mandates, other than the Commission's November 2003 order directing carriers to provide wireless and intermodal number portability.

[95] *Sprint Communications*, Answer, WVPSC Case No. 03-1610-T-SC, pp. 10-11.

[96] *AT&T of West Virginia*, Recommended Decision, WVPSC Case No. 03-1005-T-SC (April 23, 2004; Final May 13, 2004); *Sprint Communications*, Recommended Decision, WVPSC Case No. 03-1610-T-SC (July 26, 2004; Exceptions filed Aug. 10, 2004).

> *[A]dmits that it, as well as the rest of the interexchange industry, has been under severe financial pressures* for the past several years. Declining revenues have resulted from vigorous price competition among carriers, including the regional Bell Operating Companies . . . as well as from the rapid growth of substitutes for wireline long distance services, such as wireless and e-mail services. *Against this backdrop, Sprint continually searches for market-based opportunities to improve its revenue position.*[97]

Sprint also confessed that the "*opportunity afforded by the introduction of similar charges by its competitors*" impelled it to impose its charge.[98] Not once in its filings did Sprint indicate that its charge was intended to educate its customers (for $12 a year) of Sprint's regulatory burden.

AT&T likewise indicated that its decision to begin imposing its Regulatory Assessment Fee was brought on by its financial position rather than a desire to educate its customers. As noted in NASUCA's petition, AT&T's "Frequently Asked Questions" regarding the line item explained: "In the competitive environment we are in, we cannot continue to absorb these [access charges, property taxes and expenses associated with regulatory proceedings and compliance]."[99] Like Sprint, AT&T's motivation was purely remunerative.

**b. The carriers' regulatory line items do not convey accurate information to consumers about the cost of government regulation.**

A central premise of NASUCA's petition is its undisputed assertion that the line items at issue purport to recover costs attributable to a plethora of sources. Carriers' "regulatory" line items usually cite federal programs, but some cite state programs as well.[100] Usually carriers' line items cite telecommunications regulations but non-telecommunications regulations are also

[97] *Sprint Communications*, Answer, WVPSC Case No. 03-1610-T-SC, ¶ 26 (emphasis added); *see also id*., p. 11.
[98] *Id*., p. 11.
[99] Petition, p. 13 Fn. 25 & Attachment B.
[100] Petition, pp. 12-22.

cited.[101] Some carriers even include costs attributable to other carriers in their regulatory line items.[102] Regulatory line items such as these hardly educate consumers.

Moreover, the carriers do not provide consumers with any information indicating how much of their monthly fee is attributable to one of the multiple programs identified. Instead consumers are merely billed a fixed amount, $0.41 to $2.83 per month (per account, sometimes per handset) for CMRS customers and generally $0.99 per month for IXCs' customers,[103] and are told this amount recovers their carrier's regulatory costs. A wireless customer is not likely to grasp the overall cost of wireless number portability from the dollar or two included on a monthly bill, nor will an IXC's customer appreciate the cost of interstate TRS by paying $0.99 per month. Consumers who investigate carriers' regulatory line items might discover that carriers' charges vary, but would have no way of knowing what accounts for the differences nor could this consumer make economically rational choices based on the information.

### 3. The Carriers Fail to Demonstrate their Regulatory Line Items' Relationship to Costs.

Some CMRS carriers claim their regulatory line items are reasonable and recover no more than the costs imposed by various Commission programs.[104] Estimates of the carriers' costs of implementing wireless programs vary but one thing is certain – no regulatory body has reviewed the CMRS carriers' cost data to verify the carriers' claims that their line items recover only their direct costs of compliance and nothing more.

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[101] *Id.*

[102] AT&T and BellSouth purport to recover access charges as part of their "regulatory" surcharges. Petition, pp. 12; 15.

[103] *See* Competitive Coalition Comments, p. 3 (conceding that most IXCs are charging fairly uniform rates for regulatory line items).

[104] AWS Comments, pp.6-9; Cingular Comments, pp. 16-22; Leap Comments, pp. 8-10; VZW Comments, pp. 31-33. NASUCA finds it interesting that none of the carriers actually attempted to quantify their individual costs directly resulting from the regulatory programs in question in order to justify the amounts of their regulatory surcharges. Even more interesting is the fact that the IXCs did not even bother to assert that their regulatory line items are reasonably related to the costs of the regulatory programs they purportedly recover.

AWS for example, asserts that implementing Phase II E911 has "required expenditures in the hundreds of millions of dollars," that its number pooling costs "have been substantial" and that it "spent tens of millions of dollars to . . . .establish network . . . to support that mandate . . . and support costs for LNP will easily rise into the hundreds of millions of dollars."[105] Cingular cites industry-wide cost estimates prepared by the Progress & Freedom Foundation, an industry "think tank," to justify its regulatory line items.[106] Cingular also asserts that the Center for Public Integrity's ("CPI") cost estimates cited in NASUCA's petition are not appropriate when analyzing Cingular's regulatory line item because it is "assessed for the recovery of compliance costs related to multiple government programs."[107] Cingular is not claiming that CPI understated the per customer/per month costs to implement wireless number portability, only that Cingular's line item charge cannot be compared to CPI's estimate of the costs of one discrete regulatory program.

Of all the carriers, only Leap provides any detail about how it calculated its fee.[108] However, Leap's claims still require the Commission to make a leap of faith – to accept that Leap's line item recovers only its direct costs of compliance, without ever reviewing the inputs and assumptions underlying the carriers' numbers. If the Commission is going to be blamed by consumers for the regulatory line items carriers are charging, then the Commission ought to satisfy itself that the charges are reasonably and directly related to the carriers' compliance costs.

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[105] AWS Comments, pp. 6-9.

[106] Cingular Comments, p. 19. As for Cingular's reference to the Progress and Freedom Foundation's estimates of the costs of compliance, suffice it to say that regardless of who is estimating the cost, two things are apparent: (1) no one knows how much any carrier's actual cost of compliance is, since wireless carriers are not required to account to anyone; and (2) most importantly, since all wireless carriers operate under the same mandates, allowing recovery of these costs through separate surcharges allows less efficient carriers to gain an advantage over more efficient carriers. This is because the less efficient carrier can still match the rates offered by the more efficient carrier and recover the difference in "regulatory assessment" surcharges.

[107] *Id.*, p. 20. Here Cingular is making NASUCA's point that the regulatory line items are misleading and unreasonable. Since Cingular is purportedly recovering multiple programs' costs in one, lump sum charge, it is "inappropriate" (*i.e.*, impossible) to determine how much of the line item relates to any one particular program.

[108] NASUCA notes that Leap's is among the lowest regulatory line items.

NASUCA's concern is not unwarranted; it knows, as the Commission does too, that carriers sometimes overstate their costs of regulatory compliance.[109]

### 4. The Various Arguments of Verizon Wireless Must Be Rejected

For its part, VZW advances several arguments that are simply strange. First, VZW argues that "while the *TIB Order* was intended to define specifically what would constitute a violation of Section 201 in the billing context for covered carriers," NASUCA's petition is inappropriate because "NASUCA has relied only on claims that carriers have violated the *TIB Order*."[110] VZW's logic is not just circular – it is schizophrenic. The company also asserts that an enforcement action under Section 201 cannot be brought by a petition for declaratory ruling.[111] This observation is irrelevant since NASUCA is not bringing an enforcement action under Section 201 but rather is arguing that carriers are engaging in an industry-wide practice that violates this section of the Act. Finally, VZW suggests that where competition exists, there can be no violation of Section 201.[112] That the Commission considers the presence of competition in determining whether a violation of Section 201 of the Act occurred hardly means that competition renders Section 201 a nullity.

Finally, VZW complains that the wireless industry is "being singled out" for taxation, and pays 16.2% of its revenues for "government-initiated programs" compared to only 6.93% for "the typical main street business."[113] Regardless of how oppressed the wireless industry is by government (which granted wireless carriers the licenses which are the basis of their business), the point is that all wireless carriers suffer under the same mandates. Once again, allowing

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[109] *See* Petition, p. 51 Fn. 134.
[110] VZW Comments, pp. 31-32.
[111] *Id.*, p. 31.
[112] *Id.*, pp. 32-33.
[113] VZW Comments, p. 8. VZW apparently based its comments on a study by Scott Mackey, dated July 19, 2004. NASUCA has not been able to obtain a copy of this study since it is available only on a subscription basis. As a result, NASUCA has no idea of how the author defines "a typical main street business." However, even assuming the study's factual assertions are correct, they do not justify cost recovery from customers by means of separate line-items or surcharges.

recovery of compliance costs by means of separate line-items or surcharges provides less efficient carriers an advantage over more efficient carriers. Moreover, there is nothing inherent in the level of government taxation that renders a surcharge or line item a more or less appropriate cost-recovery vehicle.

#### 5. State Commissions Do Not Support Surcharges.

USCA's assertion that most state public utility commissions support surcharges is specious.[114] In contradiction of USCA's assertion, the National Association of Regulatory Utility Commissioners ("NARUC") filed comments opposing monthly surcharges that are not mandated or specifically authorized by law or regulation to be passed on to the consumer.[115] Moreover, the California, Indiana, Iowa and Ohio commissions filed individual comments supporting NASUCA's petition or assertions of customer confusion over line item surcharges.[116]

## IV. BANNING LINE ITEMS THAT ARE NOT MANDATED OR AUTHORIZED BY GOVERNMENT ACTION DOES NOT VIOLATE THE FIRST AMENDMENT.

### A. NASUCA Seeks To Prohibit Certain Carrier Conduct.

NASUCA requests that the Commission prohibit – or rather restrict – certain billing practices by carriers, *i.e.*, imposing monthly line items on customers, except in those instances where the government has expressly mandated or authorized the particular charge and the charge bears a close relationship to the amount authorized.[117] In this sense, NASUCA is asking the Commission to regulate carriers' conduct.

Some commenters claim NASUCA seeks to regulate carriers' speech rather than conduct.[118] This is not true and U.S. Supreme Court rulings support NASUCA. The Supreme Court recognizes the difference between conduct and speech. As the Court has noted, "the

[114] USCA Comment, pp. 11-12.
[115] NARUC Comment, p. 1.
[116] CPUC Comment, p. 7; IURC Comment, p. 1; IUB Comment, pp. 2-3; OH PUC Comment, pp. 2, 6.
[117] Petition, p. 68.
[118] Most commenters passed over the issue of whether NASUCA is asking the Commission to regulate conduct, rushing on to the assumption that what the Commission would be regulating is carrier "speech."

power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."[119] The Commission as well recognizes the difference between conduct and speech, in the context of carriers' billing practices, and recognizes that conduct may be regulated directly, more easily than speech.[120] The carrier billing practices at issue here – charging customers monthly line items, even those purportedly associated with government action – are conduct, not speech. NASUCA is not asking the Commission to regulate the content of carriers' speech – carriers would not be told what to say concerning government regulation, its costs, its wisdom, or anything else – they would instead be prohibited from billing customers for such costs as line items unless certain conditions are met.

VZW argues that "written communications about commercial information such as a customer's charges is clearly commercial speech, not conduct."[121] "To qualify as a regulation of conduct," VZW claims, "the government's regulation must be unrelated to expression."[122] If this argument were true, then any attempt to regulate public utilities' rates and charges is an attempt to regulate the utilities' "speech" and is subject to challenge as an infringement of the utilities' First Amendment rights. This obviously cannot be correct.

In addition, VZW argues that "the restriction on *non-government mandated* line item charges is an attempt to regulate directly the communicative impact of line item charges on consumers and thus is by definition related to expression."[123] VZW claims that NASUCA's argument to the contrary has no basis because what NASUCA seeks "is a prohibition against

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[119] *Greater New Orleans Broadcasting v. U.S.*, 527 U.S. 173, 193 (1999).
[120] *TIB Order*, Furchtgott-Roth Dissent, p. 97, *citing 44 Liquormart v. Rhode Island*, 517 U.S. 484, 507, 512 & 520 (1996); *see also* Petition, pp. 63-64.
[121] VZW Comments, p. 15, *citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 670 (1985).
[122] *Id.*, *citing Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001).
[123] *Id.* (emphasis added). The emphasized portion of the quoted passage highlights the schizophrenic – and confusing – nature of the carriers' billing practices and their comments opposing NASUCA's petition. Most of the commenters suggest that their regulatory line items are passing on the costs of government mandates (regulatory programs) on to their customers. A number of the carriers' line items (*e.g.*, AWS, VZW, ALLTEL, Cingular, Western Wireless) speak of "government mandated" programs. *See* Petition, pp. 18-23. On the other hand, many carriers include disclaimers that the line items are neither mandated nor taxes. *See id.*, pp. 12-13.

including written line item charges (*i.e.,* speech, not conduct) in bills." Here, VZW is merely begging the ultimate question – by asserting that including written line item charges in bills is speech – rather than justifying its distinction.

Subsequent arguments put forth by VZW are not only logically flawed, they are bizarre. First, VZW turns NASUCA's petition on its head by asserting that "NASUCA is not seeking a prohibition against charging customers their line items."[124] Then VZW claims that NASUCA "suggests that these charges should be added to the carriers' monthly and usage charges (*i.e.*, the conduct)."[125] In other words, carriers' monthly and usage charges are "conduct" but line items (regulatory or otherwise) are not. For good reason, VZW fails to explicate this distinction.

### B. Even If The Line Items Are Considered "Speech," The Restriction NASUCA Seeks Is Both Constitutional And Appropriate.

Even assuming NASUCA's petition seeks to regulate carriers' "speech" rather than "conduct," the restriction NASUCA seeks does not violate carriers' First Amendment rights. The carriers' regulatory line items are not "political" speech. Virtually all the commenters concede that, if the line items are speech, they are "commercial" speech which may be regulated, even prohibited. The First Amendment does not protect commercial speech that is misleading – specifically the "regulatory" line items at issue. Only if the Commission concludes – in contrast to its reasoning in the *TIB Order* – that the carriers' line items are not misleading does it need to engage in the last three prongs of the *Central Hudson* test for determining the validity of restrictions on commercial speech that is not misleading or related to unlawful activity. However, even under that analysis, the restriction NASUCA seeks does not violate the carriers' First Amendment rights.

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[124] VZW Comments, p. 15.

[125] *Id.*, pp. 15-16. VZW again grossly mischaracterizes NASUCA's petition. NASUCA simply requests that those costs that are the result of government regulation should be recovered in the carriers' usage and monthly rates unless the government has expressly mandated or authorized carriers to recover such costs in line items (in which case carriers could elect to recover such costs in usage or monthly rates or in separate line items).

### 1. Carrier Line Items are Not Political Speech.

CTIA and Nextel assert that the carriers' line items are "political" speech and that the restriction NASUCA seeks is an impermissible restriction on such speech.[126] The carriers' arguments surpass credulity.

The line items in question hardly, as CTIA claims, "highlight the expense" of carriers' compliance with government regulation. The line items themselves, which merely include a monthly charge and a label, clearly do not convey any information other than commercial speech. Nor do carriers' disclosures or descriptions of the charge (where one is actually provided)[127] when coupled with the charge transform the line item into protected speech, political or otherwise. As a factual matter, charging customers a dollar a month or so and describing the charge as recovering costs to comply with "various government-mandated programs," etc. tells customers virtually nothing about the expense of government regulation. As a matter of political speech, if the regulatory line items are intended to prompt irate customers to express their opinions that government should eliminate or reduce telecommunications regulation, then carriers' efforts are particularly inept. Carriers omit all the information customers would need to communicate their ire to government or to bring about changes in government policy. If carriers were *really* interested in having consumers question the purposes of government programs, they would include bill inserts or messages to that effect.

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[126] CTIA asserts that the regulatory line items in question "highlight the expense associated with complying with regulatory obligations" and "prompt consumers to contact lawmakers and to support or oppose existing programs . . . and their extension," CTIA Comments, p. 20, *citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (the regulatory line items "likely . . . deserve greater protection than that accorded to traditional commercial speech," noting that commercial speech can also convey a political message). The association claims that the restriction NASUCA seeks on such line items would "silence these political statements." *Id.*, pp. 20-21. Similarly, Nextel suggests that the "truthful" information contained in the carriers' regulatory line items provides "information to consumers about how government programs affect telecommunications costs" and is "certainly an issue of public concern." Nextel Comments, p. 24.

[127] AWS, for example, provides no information regarding what its $1.75 regulatory line item recovers on customers' bills.

Nor are the commenters' sweeping assertions that regulatory line items are political speech supported by the case law they cite. Nextel, for example, claims that, "according to the Supreme Court, political speech includes *all* speech that raises or discusses matters of public concern."[128] The decisions Nextel cites contain no such sweeping definition of political speech. More importantly, such a definition would be at odds with Supreme Court pronouncements in other cases. For example, the Court rejected an argument that a regulation prohibiting "Tupperware" presentations in university dormitories constituted an impermissible restriction on free speech because the presentations included information touching on such subjects as how to be financially responsible and how to run an efficient home, noting:

> No law of man or of nature makes it impossible to sell housewares without teaching home economics or to teach home economics without selling housewares. . . . *Including these home economics elements no more converted [the seller's] presentations into educational speech than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech*. . . . [C]ommunications can "constitute commercial speech notwithstanding the fact that they contain discussion s of important public issues . . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.[129]

Similarly, the Court concluded that a contraceptives' manufacturer's informational pamphlets that promoted its products remained commercial speech – notwithstanding the fact that they contained discussions of important public issues such as venereal disease and family planning.[130] The Court wrote:

> We have made clear that *advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech*. . . . A company has the fully panoply of protections

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[128] Nextel Comments, p. 24 (emphasis original), *citing Connick v. Myers*, 461 U.S. 138, 145 (1983); *Coady v. Steil*, 187 F.3d 727, 731 (7th Cir. 1999). Indeed, the *Connick* Court reversed lower courts' decisions that a disgruntled assistant district attorney's questionnaire to other employees regarding the functioning of the DA's office "relate to the effective functioning of [that office] and are matters of public importance and concern." *Connick*, 461 U.S., at 143 ("the District Court got off on the wrong foot in this case" by considering the questionnaire to touch upon matters of public concern).

[129] *Board of Trustees, S.U.N.Y. v. Fox*, 492 U.S. 469, 474-75 (1989) (emphasis added)(citations omitted).

[130] *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 67-68 (1983)(emphasis added).

> available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. *Advertisers should not be permitted to immunize false or misleading product information form government regulation simply by including references to public issues*.[131]

Finally, regarding a New York commission's order prohibiting electric utilities' advertisements promoting the use of electricity, the Court wrote that the state "restricts only commercial speech, that is expression *related solely to the economic interests of the speaker and its audience*."[132] That commercial speech could address broader, social interests without being transmuted into political speech was also made clear by the Court: "Commercial expression not only serves the economic interest of the speaker but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[133]

In considering the commenters' claims that regulatory line items are protected political speech, the Commission should take its cue from the *TIB Order*. There, the Commission rejected suggestions that standardized labeling requirements for certain regulatory costs (*i.e.*, USF contributions, the SLC and local number portability) would violate the First Amendment. The Commission concluded that its guidelines were proper under the *Central Hudson* analysis applied to commercial speech.[134] To NASUCA's knowledge, no one appealed the *TIB Order* on First Amendment grounds. The line items are at most commercial speech.

### 2. Restricting Carriers' Line Items is Not an Impermissible, Content-Based Regulation of the Time, Place or Manner of Protected Speech.

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[131] *Id.*, at 68 (citations omitted); *see also Edenfield v. Fane*, 507 U.S. 761, 767 (1993)("commercial speech is 'linked inextricably' with the commercial arrangement that it proposes . . . so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself").

[132] *Central Hudson*, 447 U.S., at 561 (emphasis added).

[133] *Id.*

[134] *See TIB Order*, ¶¶ 61-65.

VZW asserts that the restriction NASUCA seeks on regulatory line items is an impermissible, content-based regulation of the time, place or manner of protected speech.[135] Even if NASUCA's proposed restriction is content-neutral, VZW claims, "the government may impose . . . reasonable . . . time, place and manner" restrictions on protected speech only if those restrictions are "justified without reference to the content of the speech . . . are narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information."[136]

VZW's argument rests upon a faulty premise: that the proposed restriction on carriers' line items should be analyzed as a "time, place, or manner" restriction of protected speech. The line items at issue are not protected speech, occurring in a public place or forum, and the standard VZW urges does not apply. According to the Supreme Court, the "time, place, or manner" test VZW advocates "was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a 'public forum.'"[137] Cases applying this test all involve the concept of protected speech or expressive conduct in public places or public forums and, under limited circumstances, private property.[138] The constitutional analysis of "time, place or manner" restrictions does not apply where government regulates commercial speech.[139] On this point the Court is clear:

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[135] VZW Comments, pp. 20-21, *citing Reno v. ACLU*, 521 U.S. 844 (1997); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). *Id., quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Incidentally, VZW concedes that this latter standard is essentially the same standard applied to regulation of commercial speech under the *Central Hudson*. *Id.*

[136] *Id.*, pp. 20-21 (citations omitted).

[137] *Barnes v. Glen Theatre Inc*, 501 U.S. 560, 566 (1991), *citing Rock Against Racism*, 491 U.S. , at 791.

[138] *See, e.g., Rock Against Racism*, 491 U.S. 781 (regulation to control noise levels at a concert bandshell in a public park); *Community for Creative Non-Violence*, 468 U.S., at 293 (regulation prohibiting camping in a national park); *Boos v. Barry*, 485 U.S. 312 (1989)(regulation restricting picketing criticizing foreign governments within 500 feet of foreign diplomatic facilities); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992)(regulation prohibiting solicitation and distribution of materials in airport); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)(ordinance prohibiting homeowners' placement of most signs on their property).

[139] *See Board of Trustees*, 492 U.S 469, at 478 (two lines of authority – "time, place or manner" restrictions and restrictions of political speech – "do not of course govern" analysis of university's restriction on commercial speech).

> With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances. . . . *By contrast, regulation of commercial speech based on content is less problematic. In light of the greater potential for deception or confusion in the context of certain advertising messages, content-based restrictions on commercial speech may be permissible.*[140]

### 3. NASUCA's Proposed Restriction on Carrier Line Items is a Permissible Regulation of Commercial Speech.

Most commenters concede that carriers' line items constitute commercial speech, opposing NASUCA's petition on the grounds that the restrictions it seeks are an unreasonable restriction on commercial speech.[141] Assuming the Commission agrees that NASUCA's proposal impacts carriers' speech, rather than conduct, the commenters' characterization of that speech as commercial is clearly in accord with Supreme Court rulings. The Court consistently defines "commercial speech" as "speech which does no more than propose a commercial transaction."[142] Commercial speech is "expression *related solely to the economic interests of the speaker and its audience*."[143] Furthermore, commercial speech is "linked inextricably" with the commercial arrangement that it proposes, "so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself."[144]

As commercial speech, the line items are subject to the analysis first laid done by the Supreme Court in *Central Hudson* and applied ever since. Under the *Central Hudson* test, four questions must be addressed: First, is the communication neither misleading nor related to unlawful activity.[145] Second, if the communication is neither misleading nor related to unlawful

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[140] *Bolger*, 463 U.S., at 65 (emphasis added)(citations omitted).

[141] VZW Comments, pp. 15-16; MCI Comments, pp. 11-12; Leap Comments, pp. 14-15.

[142] *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 762 (1976); *see also Board of Trustees*, 492 U.S., at 473.

[143] *Central Hudson*, 447 U.S., at 561 (emphasis added).

[144] *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

[145] If the communication *is* misleading or *is* related to unlawful activity, then the inquiry is over. No constitutional protection extends to commercial speech that is either misleading or related to unlawful activity. *Central Hudson*, 447 U.S., at 563 (citations omitted). Since the regulatory line items in question do not satisfy the first element of the *Central Hudson* test, the Commission need not apply the test's last three elements.

activity, then the question is asked whether the asserted government interest is substantial. Third, if the first two questions yield positive answers, then the court must determine whether the regulation directly advances the governmental interest asserted. Fourth, assuming the prior three questions are answered affirmatively, the court must determine whether the regulation is not more extensive than is necessary to serve that interest.[146] Under the *Central Hudson* test, the restrictions NASUCA seeks are clearly permissible and do not violate the carriers' First Amendment rights in such speech.

**a. The regulatory line items are misleading commercial speech.**

NASUCA does not suggest that the carriers' regulatory line items relate to unlawful activity. Rather, as previously discussed both herein and NASUCA's original petition, they are misleading both in content and in application. As the Court in *Central Hudson* noted:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. . . . *Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it*.[147]

NASUCA has already discussed the numerous ways in which the carriers' line items are false, misleading or deceptive. The carriers' regulatory line items are misleading in several ways. First, the line items recover costs that have not been expressly allowed by the Commission's orders. Second – and more importantly, the line items fail to convey accurate or even truthful information to consumers since they contain vague or ambiguous statements regarding what costs are being recovered by the carriers, often suggest that the surcharges are

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[146] *Central Hudson*, 447 U.S., at 564, 568.

[147] *Central Hudson*, 447 U.S., at 563 (emphasis added), *citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 464-65 (1978); *see also Ibanez v. Florida Bd. of Accountants*, 512 U.S. 136, 142 (1994)("only false, deceptive, or misleading speech may be banned. . . [c[ommercial speech that is not false, deceptive, or misleading can be restricted" if the State meets the remaining prongs of *Central Hudson*'s test) .

government-mandated, and lump together in one sum costs associated with a multitude of regulatory programs.

Regulatory line items that identify but aggregate several regulatory programs into one charge are little better than those that ambiguously recover costs of "government-mandated programs." A $2.83/month charge for costs associated with "one or more of the following: E911, number pooling and wireless number portability" at least identifies some of the programs at issue but it does not convey to a consumer how much of the customer's charge is attributable to each program. Moreover, at least in the case of E911, the Commission has not specifically authorized carriers to recover their implementation costs through surcharges. Furthermore, consumers in many states are already paying state E911 fees and are likely to be confused by a "Federal E911" charge.

The regulatory line items leave customers in the dark regarding just about every issue that may be of interest to them. The line items prompt consumer complaints of the sort regulators and consumer advocates hear all too often (*e.g.*, "My bill's too high" or "I don't know what this charge is about"). As the Commission knows, these kinds of complaints generally go nowhere. Either the customer cannot adequately describe his or her complaint to enable the regulator to address the issue or take action upon it, or the regulatory agency itself is unsure what programs are involved and whether it has jurisdiction to address the complaint.[148]

Since the regulatory line items are misleading or deceptive, no First Amendment protection extends to them. But even if the Commission considers the regulatory line items to be commercial speech, and even if it considers such line items to be non-misleading, the

[148] As the Commission knows, many states have – by statute – removed CMRS carriers from state commission regulatory oversight altogether. The response to a complaint about a wireless regulatory line item is likely to be "we don't regulate wireless carriers, take it up with the FCC." It has been the experience of NASUCA members that few customers bother to take their complaints on to another agency, especially a federal agency..

Commission should adopt the restrictions urged by NASUCA because those restrictions satisfy the remaining three elements of the *Central Hudson* test.[149]

**b. The government's interest in accurately described and reasonably priced regulatory line items is substantial.**

Some commenters actually assert that NASUCA failed to demonstrate a "substantial" government interest in this matter.[150] The fact is that carriers are billing customers hundreds of millions, if not billions, of dollars annually and are blaming the government for it. In the detariffed, deregulated world in which the IXCs and CMRS carriers operate, there is no "check" to ensure that carriers are not over-recovering their purported regulatory compliance costs. In this context, the government's interest in ensuring that the line items are both accurate and reasonably related to the costs imposed by regulation is not only substantial, it is paramount.

In any event, the Commission has already spoken to this issue. In its *TIB Order*, the Commission previously articulated the substantial interest it has in protecting consumers from misleading or deceptive speech, and the substantial interest it has in establishing certain requirements regarding the manner in which line items are labeled and described.[151] At least some of NASUCA's opponents rightly conceded that the government's interest in these matters is substantial.[152]

**c. Banning misleading and overstated regulatory materially advances the government's interest.**

Likewise, the Commission has already articulated how requiring standardized labels that are consistent, understandable and that do not confuse or mislead consumers directly advances

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[149] Of course, if the Commission determines that the regulatory line items in question are truthful and non-misleading, then the declaratory ruling sought by NASUCA is not appropriate. The Commission could, however, treat NASUCA's petition as a request to initiate a rulemaking to amend, modify or repeal its TIB rules to address the regulatory line items in question and any regulation would need to comply with the final three elements of the Court's test in *Central Hudson*.

[150] US Cellular Comments, pp. 6-7

[151] *See TIB Order*, ¶¶ 62-65 (discussing substantial interest government has in standardized labels and preventing consumers from being misled or deceived).

[152] CTIA Comments, p. 18; RCA Comments, p. 9; BellSouth Comments, p. 3.

the governmental interest in the *TIB Order*. As the Commission noted, the standardized labels for the specific regulatory costs that carriers were allowed to recover through line items "will encourage carriers to provide consumers with information that will enable them to understand their telecommunications bills, and prevent carriers from misleading consumers into believing they cannot 'shop around' to find carriers that charge less for fees resulting from federal regulatory action."[153]

Even if the Commission concludes that the regulatory line items being employed by carriers are not misleading, or are only potentially misleading, there should be no question that the information they convey to consumers is not particularly accurate or informative. Line items that charge certain monthly fee for various programs or several programs lumped together do not enable customers to understand their telecommunications bills any better than a charge labeled as "miscellaneous" for example. Furthermore, at least among major wireline IXCs, their regulatory line items are remarkably consistent in price: AT&T, Sprint, BellSouth and apparently Qwest – all charge customers $0.99 per month to cover the carriers' costs of regulatory compliance.[154] The fact that the major IXCs all charge an identical regulatory line item invites the question whether consumers believe they can shop around for lower charges. Certainly a consumer upset by being charged an extra dollar a month by Sprint is going to be less inclined to switch service if, after doing some research, the customer learns that AT&T, Qwest, BellSouth and others are charging the same amount for the same thing.

[153] *TIB Order*, ¶63.

[154] That all the carriers' line items are the same is particularly remarkable when one considers the fact that the charges purport to recover different costs. AT&T and BellSouth include interstate access charges in their line item charges, for example. Sprint does not. Meanwhile, it is unclear what regulatory costs Qwest's charge recovers. *See* IUB Comments, p. 3. Furthermore, the fact that each carrier is imposing a $0.99 surcharge is noteworthy given the fact that the carriers' customer bases vary substantially.

Some commenters question whether NASUCA has demonstrated that customers are actually harmed by the growing number of regulatory line items being assessed.[155] It is true that NASUCA did not canvas every carrier's website in order to ascertain its practices regarding regulatory line items. It is also true that NASUCA did not conduct a survey of carriers' customers or carriers to determine how many complaints or inquiries regarding regulatory line items had been submitted. This is hardly fatal to NASUCA's petition, however.

For one thing, NASUCA is not writing on a clean slate. Starting with the *TIB NPRM*,[156] the Commission has cited ample evidence regarding the failure of bills to provide customers with the information necessary "to understand readily the precise nature of charges appearing on [their] bills" and noted "many complaints and inquiries resulting from the practice of some carriers of including in their bills line item charges for universal service or access charges, without adequate explanation of the basis for these charges."[157] The Commission cited evidence of the numerous customer complaints received regarding unclear and confusing charges on phone bills in the *TIB Order* as well.[158]

In addition, NASUCA's concerns about the number of consumer complaints and inquiries are borne out by the comments submitted by parties supporting its petition. The Iowa commission noted that the number of customer inquiries it receives regarding carrier surcharges "runs into the hundreds, if not thousands . . . over the past few years."[159] Similarly, the State of Texas notes that it "has received countless bills containing instances of regulatory fees and surcharges purporting to recover 'regulatory' or 'administrative' costs, but which upon further

[155] IDT Comments, pp. 1-3; MCI Comments, p. 7; Sprint Comments, pp. 8-9; RCA Comments, pp. 3, 5; SprintComments, pp. 8-9
[156] *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, FCC 98-232, Notice of Proposed Rulemaking (rel. Sept. 17, 1998) ("*TIB NPRM*").
[157] *TIB NPRM*, p. 2 & Fn. 4.
[158] *TIB Order,* ¶ 3 Fn. 7.
[159] IUB Comments, p. 2.

analysis are nothing other than regular operating expenses. . . ."[160] The Minnesota Department of Commerce notes similar experiences, noting that, unlike some of the line items cited in NASUCA's petition, many carriers do not stop at billing customers a few dollars a month.[161] Other consumer groups and regulatory agencies cited similar experiences with numerous complaints and inquiries.[162]

Even the comments of NASUCA's opponents – when parsed closely – corroborate the harms cited by NASUCA. For example, MCI claims that "only 2% of the billing complaints" its customer relations department received from July 2003 through June 2004 were related to surcharges and fees.[163] As the Commission knows, if the number of billing complaints MCI receives is fairly large, 2% becomes a significant number of consumers. More enlightening are Sprint's comments. Sprint notes that, in the first two months after implementing its Carrier Cost Recovery Fee, it received 3,229 "inquiries" about the charge (though only 24 "complaints"). The company claims that this represents less than 0.1% of the accounts to which the charge is applied.[164]

Some commenters also cite Commission statistics to support their contention that line items are not a matter of concern. For example, Sprint notes that the Commission received a total of 10,592 "billing and rate" related complaints from wireless customers and 17,028 such complaints from wireline customers last year[165] and claims this represents a tiny percentage of the total wireless and wireline customer base. When viewed from a slightly different perspective, these numbers reach alarming proportions. Consider slamming. Over the past three years the Commission received about 23,900 slamming complaints – about 7,800 complaints per

[160] Texas Comments, p. 2
[161] Minnesota Commerce Comments, pp. 5-6.
[162] *See* Consumers Union Comments, pp. 2-3; Nat'l. Consumers League Comments, p. 4; Comments of various individuals filed with the Commission.
[163] MCI Comments, p. 7.
[164] Sprint Comments, p. 17, Ftn. 37.
[165] Sprint Comments, p. 9; *see also* IDT Comments, pp. 2-3.

year.[166] By Sprint's reckoning, only a tiny percentage of long distance customers served nationwide have submitted a slamming complaint – but no one would dispute that slamming remains a major problem. In comparison, the total number of billing and rate complaints received by the Commission in 2003 tripled the number of slamming complaints during the same period and exceeded the total number of slamming complaints received by the Commission over the past three years *combined* (27,620 v. 23,900).[167] Of course, MCI and Sprint overlook the fact that a large number of consumer complaints regarding carriers' regulatory line items are received by state agencies as well. For example, the West Virginia commission received approximately 667 informal complaints regarding billing matters in 2003 – a healthy sum considering that the state only accounts for about 0.4% of wireline and wireless subscribers nationally.[168]

In perhaps an unintentional display of candor, the RCA tacitly admits the scope of the problem and the harm to consumers resulting from the plethora of regulatory line items being imposed by carriers. The RCA contradicts its assertion that NASUCA did not establish consumer harm by admitting that "[c]arriers are *acutely aware* of the nuisance and *intense irritation* caused to subscribers who feel "nickeled and dimed" by surcharges."[169] Carriers do not become "acutely aware" of customers' "intense irritation" regarding line items from an isolated complaint or two.

Some of the carriers (*e.g.*, Cingular, Nextel and VZW) assert that their regulatory line items recover their costs and are not profit centers, as alleged in CPI's October 2003 article cited

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[166] *The FCC Taking the Profit Out Of Slamming*, News Release, p. 1 (Aug. 5, 2004).

[167] NASUCA is not suggesting that every billing and rate related complaint involves carriers' line item charges. But given the anectdotal experience of NASUCA members and the comments filed by other consumer groups and individuals, NASUCA would expect the percentage of line item-related complaints to be statistically significant.

[168] Management Summary Report, p. 39 (Jan. 2004) (http://www.psc.state.wv.us/Mgmt_Sum/MSR2004_Report.pdf) *see also Local Telephone Competition: Status as of December 31, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Tables 9 & 13 (June 2004).

[169] RCA Comments, p. 7 (emphasis added).

in NASUCA's petition.[170] Only one carrier – Cingular – deigns to address the over recovery of costs in the wireless industry cited in CPI's article. However, Cingular merely claims that CPI is wrong and invites the Commission to rely on the cost estimates for wireless carriers' compliance with three programs (number portability, number pooling and E911) developed by the Progress & Freedom Foundation.[171] As previously noted by NASUCA, regardless of who is estimating the costs, two things are apparent: (1) CMRS carriers' cost of compliance are not reviewed by any regulatory authority; and (2) use of surcharges to recover these costs gives an advantage to less efficient carriers.

There is, therefore, ample evidence of harm to consumers resulting from carriers' increasing use of line items in general, and regulatory line items in particular. Adopting the reasonable restriction on carriers' use of line items, as requested by NASUCA, will go far toward reducing the harms noted in the Commission's *TIB Order*.

**d. The restriction on regulatory line items sought by NASUCA is narrowly tailored to achieve the government's interest in accurate, and reasonable, regulatory line items.**

Most opponents of NASUCA's petition argue the restriction on line items that NASUCA seeks is overbroad and unduly restrictive, and thus it is not narrowly tailored to achieve the government's interest under the fourth prong of the *Central Hudson* test.[172] Those opposing NASUCA's petition on this particular point rely upon legally and logically flawed arguments.

Contrary to opponents' assertions, NASUCA's proposed restriction would allow carriers to continue recovering: universal service fund assessments, the SLC fee, local number

[170] Petition, pp. 47-50**.** What is interesting to NASUCA is that so many of the carriers filing comments – AT&T, AWS, Nextel, MCI, and Sprint – make no effort to demonstrate that the amounts they recover in their regulatory line items bear any relationship to the costs of the regulatory programs the charges purportedly recoup.
[171] Cingular Comments, pp. 19-21.
[172] Competitive Coalition Comments, pp 2 & 5; BellSouth Comments, p. 4; CTIA Comments, pp. 19; Global Crossing Comments, p. 4; Leap Comments, pp. 15-16; MCI Comments, p. 13; NTCA Comments, p. 5; Nextel Comments, pp. 23-24; RCA Comments, p. 9; Sprint Comments, p. 10; US Cellular Comments, p. 10; Verizon Comments, pp. 13-15 & Fn. 36; VZW Comments, pp. 19-20.

portability (at least for ILECs), annual assessments for interstate TRS and the cost of administering the NANP, Commission annual regulatory fees, the federal telecommunications excise tax, and various state and local taxes and fees. What carriers would not be able to do is place line item charges on customer bills for such things as "compliance with government-mandated programs," or "regulatory compliance and proceedings," or "costs of government regulation." Nor would carriers be able to continue imposing lump sum charges to recover their costs of complying with "one or more" regulatory programs for which line items have been authorized.

NASUCA's proposal hardly "reinstates rate regulation" on the telecommunications industry,[173] or gives states the right to "engage in preempted rate regulation of wireless carriers,"[174] or destroys the competitive market that exists for long distance and wireless telecommunications service. Nor does NASUCA's proposal result in consumers receiving less information about the costs of government regulation.

Next, many commenters assert that, if there is a problem with such charges there are other, less sweeping measures to address the problem and these measures must be tried first.[175] However, finding the least restrictive measure to address the problem of line charges that confuse and frustrate customers is not what the law requires. In decisions applying the *Central Hudson* test, the Supreme Court has made it clear that the government is not obligated to find the

[173] Sprint Comments, p. 10.
[174] Leap Comments, p. 6; Nextel Comments, p. 2.
[175] *See, e.g.*, RCA Comments, p. 9 (no dispute consumers should get full disclosure of charges and charges should be fair and reasonably related to regulatory costs, and if the Commission wants additional categorization or aggregation of charges, association is happy to participate); USTA Comments, p. 3 (the problem is that certain carriers are not complying with the Commission's binding TIB principles and the answer is not new rules but enforcement actions under 47 U.S.C. § 201); Competitive Coalition Comments, pp 2 & 5 (enhanced Commission consumer education efforts should be tried first and if that fails, use existing federal and state enforcement authority); Cingular Comments, p. 23 (take up uniform labels in the current *TIB NPRM*); CTIA Comments, pp. 13-16 (refrain from further regulation and give the voluntary Consumer Code for Wireless Service time to work); Global Crossing Comments, p. 4 (rely on enforcement actions and separate line items for administrative costs); Leap Comments, p. 16 (NASUCA should work with industry to develop standardized labels); NTCA Comments, p. 5 (Commission should simply enforce its current rules); Nextel Comments, pp. 24 (Commission should enforce existing TIB rules or develop federal billing guidelines for wireless carriers); Verizon Comments, pp. 14-15 (Commission should enforce the *TIB Order*).

least restrictive means of remedying problematic commercial speech. Instead, the government is merely required to show that the regulation is "narrowly tailored" to the asserted interest.[176]

According to the Court, "a regulation is narrowly tailored if the government's interest would be achieved less effectively without the regulation."[177] NASUCA's opponents do not seriously assert that the restriction on carriers' use of line items would not be effective in constraining carriers' increasing use of confusing and inaccurate line items – indeed, they suggest that the restriction would be too effective. However, as previously discussed, the restriction sought by NASUCA is not nearly as drastic as some commenters suggest. Moreover, the alternatives suggested by NASUCA's critics are all less effective than the restriction on regulatory line items proposed by NASUCA.

**(i) Relying on enforcement of the TIB guidelines is inadequate.**

Commenters suggest enforcement of the Commission's current TIB rules is enough. However, this measure simply preserves the *status quo ante* – which is not satisfactory. Relying upon individual consumers to bring Section 201 enforcement actions is not likely to be effective since it is absurd to expect consumers to file federal actions under Section 201 over a couple dollars a month in line items. Relying upon state commissions or agencies fails to recognize the fact that most state agencies are either inadequately staffed or are focused on the intrastate market and rarely file federal telecommunications actions on behalf of consumers. State agencies, moreover, are often precluded by statute from regulating wireless carriers and therefore neglect issues regarding that segment of the market. Relying on the Commission itself to bring

[176] *New Orleans Broadcast Ass'n.*, 527 U.S., at 188; *Bd. of Trustees*, 492 U.S., at 480; *see also* CTIA Comments, p. 19.

[177] *Ward v. Rock Against Racism*, 491 U.S. 781,798-99 (1989). Although *Rock Against Racism* was decided in the context of a content-neutral restriction on the time, place and manner of speech, the Commission cited this decision and this particular point in its analysis of whether its Truth-in-Billing requirements satisfied the fourth prong of the *Central Hudson* test. *TIB Order*, ¶ 64 Fn. 176. Further, VZW noted that the standard applied to regulations like those in *Rock Against Racism* is "fundamentally the same" as the standard applied under the *Central Hudson* test. VZW Comments, p. 21.

Section 201 actions to enforce the requirements of the *TIB Order* sounds good, but NASUCA is unaware of the Commission having filed a single enforcement action against a carrier for violations of the billing requirements of the *TIB Order*.

Another problem with relying on enforcement actions to remedy misleading, deceptive or unreasonable carrier line items is the length of time associated with prosecuting a telecommunications complaint case through the federal courts. Allowing for one, possibly two appeals and the standard motions practice in federal court, an action is going to take years before it is resolved. This problem was eloquently pointed out in Minnesota's comments.[178] Then consider the fact, mentioned in NASUCA's petition, that there are approximately 1,000 IXCs and over 1,300 CMRS carriers that may be appropriate enforcement targets[179] and the task of enforcing the TIB rules through Section 201 becomes a daunting task indeed.

One other, obvious, problem with the suggestion that the Commission simply enforce its TIB rules: NASUCA's petition and the comments filed in response show clearly that there is deep and fundamental disagreement over what the rules currently allow or disallow. That uncertainty would have to be litigated in various federal courts, presenting the very real possibility of inconsistent or conflicting decision by the court.

**(ii) Better consumer education efforts are unlikely to work.**

Better Commission consumer education programs are, of course, welcome. Any program that helps consumers understand their telephone bills, and the telecommunications laws or regulations that apply to them, is beneficial. But communicating meaningful, easily understood information about widely varying billing practices among a multitude of carriers, to the widest possible audience, promises to be a frustrating and ultimately futile task. The difficulties

[178] Minnesota Commerce Comments, pp. 5-6.
[179] NASUCA Petition, p. 23, ftn. 61.

experienced by the NCL in trying to keep up with carriers' line items as part of its consumer outreach efforts[180] provides insight into the limitations of Commission or other regulatory outreach efforts to educate consumers.

**(iii) NASUCA's experience suggests collaborative efforts to address billing practices are not likely to be effective.**

Nor does NASUCA place much hope in some commenters' suggestion that industry and consumer groups work out standardized labels to propose to the Commission. For one thing, the Commission encouraged industry and consumer groups to do that five years ago and, to NASUCA's knowledge, no meeting was ever held. Nor does NASUCA's experience with other industry/consumer forums make it optimistic that such a forum would produce meaningful rules anytime soon. NASUCA – together with NARUC – sought to participate in the Intercarrier Compensation Forum's efforts to develop a comprehensive intercarrier compensation regime. As the Commission knows, those efforts were soundly rebuffed. Moreover, the length of time associated with such collaborative efforts to develop standardized labels, in a constantly shifting telecommunications industry ensures that, by the time such labels are proposed and adopted, they will in all likelihood be obsolete.

**(iv) Deferring carriers' regulatory line items to the *TIB FNPRM* is not the answer either.**

For similar reasons, NASUCA deferring the issues raised in its petition to the still pending *TIB FNPRM* will not address the issue of regulatory line items, which violate the Commission's current order.[181] For one thing, that notice focuses on the development of standardized labels for carrier line items, not the issue raised by NASUCA. If the Commission wished to take up the restriction urged by NASUCA in its petition, a new notice presumably would need to be prepared and issued, additional comments would be received – comments that

[180] NCL Comments, p. 4.
[181] Cingular Comments, pp. 22-23; CTIA Comments, p. 13 Ftn. 25.

would probably look a lot like the comments filed in this proceeding – and the Commission would, at some point in the indefinite future, adopt final rules. More importantly, standardized labels are unlikely to address all the issues associated with carriers' use of line items. Furthermore, by the time detailed standards for labeling could be developed, industry will likely have moved on to some new billing practice that confuses and frustrates consumers.

**(v) Competition is no substitute for Commission regulations restricting carriers' use of regulatory line items.**

Finally, some commenters opposing NASUCA's petition suggest that the most effective means of dealing with the confusion and abuse stemming from carriers' use of line items is to do nothing, to leave the ills caused by such fees to be cured by palliative effects of the competitive market.[182] However, the Commission has already spoken to the notion of leaving problems with carrier billing practices to be resolved by the invisible hand of the marketplace. In the *TIB Order*, the Commission rejected the broad notion that competitive forces suffice to constrain carrier practices that mislead, deceive, confuse or otherwise harm consumers.[183]

There is even less reason for the Commission to leave problems with carrier regulatory line items to be resolved by competition today. As noted by NASUCA, competition appears to be driving the carriers to utilize line item charges and fees with greater frequency in order to maintain at least the appearance of low monthly and usage rates.[184] Even NASUCA's opponents concede that the use of such fees is accelerating, though some brazenly suggest that it is

[182] Competitive Coalition Comments, p. 12; BellSouth Comments, pp. 11-12; Cingular Comments, p. 5; CTIA Comments, pp. 8-16; Leap Comments, pp. 6-12; MCI Comments, pp. 9-10; Sprint Comments, pp. 12-13; US Cellular Comments, p. 4; USTA Comments, pp. 7-10; Verizon Comments, pp. 6-8.
[183] *TIB Order,* ¶¶ 6-7.
[184] NASUCA Petition, p. 60.

government that is to blame for the recent rash of regulatory line items cropping up on customers' bills.[185]

Many commenters base their optimism in competition market on the power of "sophisticated" consumers who can figure out when they are being overcharged and "vote with their feet."[186] The evidence presented to the Commission previously in the TIB docket, as well as in this proceeding, suggests that the average consumer is not as sophisticated, not as powerful, as commenters suggest. Nearly all the individuals who filed comments in this docket appear to be wireless customers and most of their comments express fundamental confusion over the origin and purpose of the regulatory line items they are paying.[187] Some consumers also noted CMRS carriers' early termination penalties if they attempted to go to another carrier out of frustration with such charges.[188] Others noted that they changed carriers due to the high fees on their bills, only to find that their new carriers' fees do not result in any cost savings.[189] Perhaps customers in eastern Pennsylvania are an aberration rather than the norm but NASUCA doubts it, especially in light of consumer advocates' experience elsewhere.

Moreover, recent news reports suggest that wireless consumers are not so sophisticated, or that the wireless industry is so consumer oriented, that the Commission should leave them exposed to practices that are misleading or deceptive.[190] The Commission should, under the

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[185] NTCA Comments, p. 3 (the industry is in a "transition period" and the "more plausible explanation" for the confusing quality of customers' bills are "new regulations and unfunded mandates adopted on a daily basis").

[186] To be fair to these commenters, this sentiment is shared by some within the regulatory community as well. NASUCA believes that a *caveat emptor* approach to the growing use of regulatory line items, and the consequent growing frustration and confusion among consumers, would be an unjustifiable step backward from the pro-consumer objectives enunciated by the Commission in the TIB Order.

[187] Boyre Comments; Murray Comments; Coldren Comments. On the other hand, NASUCA wryly notes that some of the consumer commenters are pretty discerning. See, Marks Comments ("I feel Nextel is taking advantage of us. Maybe that's where they get their money for NASCAR, on my expense."); O'Donnell Comments ("I work with federal and state contracts that are easier to read than my cell phone bill.").

[188] Boyre Comments; Murray Comments; O'Donnell Comments.

[189] Coldren Comments; Reichert Comments.

[190] "Survey finds three-fourths of monthly wireless minutes go unused," RCR Wireless News (Aug. 5, 2004). According to this article, "sophisticated" wireless customers fail to use 78% of the minutes they pay for. Moreover, consumers with monthly plans advertised at $20 or less are paying 52% more when they are billed, and the average wireless household pays $17.75 on average in taxes, fees and additional surcharges.

circumstances, follow through on its pro-consumer efforts begun in the *TIB Order* and at least impose reasonable limits on the fees and surcharges carriers gin up and blame on government.

### (vi) The CTIA Code will not deter CMRS carriers from violating the Commission's TIB Order.

Several commenters claim CTIA's Consumer Code for Wireless Service ("Code") provides CMRS carriers with sufficient incentive to give consumers enough billing information to make informed choices.[191] The Commission should reject this suggestion. CTIA's Code is a paradigm that lacks power: compliance with the Code is not mandatory; the consequences for non-compliance with the Code are minimal; and Code enforcement rests with the CTIA.[192]

CTIA claims that "each carrier's competitors will be watching other companies' compliance and will respond accordingly"[193] but that claim hardly guarantees Code compliance. CMRS carriers prefer voluntary self-regulation to mandatory regulation and enforcement because there is no rigorous examination of the carrier's advertising campaigns and billing practices and no record of any disciplinary efforts. Moreover, CTIA's members can change the Code at any time. With regard to the line items in issue, the significant discrepancies between the wireless carriers' advertised monthly base prices and the amounts listed on the consumer's ultimate bill (usually accounted for by line items) confuses consumers and shows that the Code is inadequate.

Until recently, no CMRS carrier was *required* to disclose to any consumer, prior to signing a contract, the total amount, or range, of line items that the consumer would pay for government-mandated and non-mandated cost recovery fees. On July 21, 2004, 32 states

[191] *See, e.g.*, CTIA Comments, p. 18, Nextel Comments, pp. 11-12.
[192] The Code sets 10 aspirational goals that all wireless carriers are encouraged to meet voluntarily. Carriers who choose to comply with the 10 points of the Code earn the right to use a CTIA seal, certifying their adherence to industry standards. Wireless carriers are not required to comply with the Code and those who do not face only the prospect of losing the right to use CTIA's seal in their advertising.
[193] CTIA Code (available at www.ctia.org).

announced a settlement ("Assurance of Voluntary Compliance" or "AVC") with VZW, Cingular and Sprint PCS, pursuant to which these carriers must disclose, clearly and conspicuously, at the point of sale (*i.e.*, the sales counter, on the web, and over the phone) prior to committing the consumer to a long-term contract:

> The fact that monthly taxes, surcharges, and other fees apply, including a listing of the name or type and amount (or, if applicable, a percentage formula as of a stated effective date) of any monthly discretionary charges that are generally assessed by Carrier on Consumers in a uniform dollar amount or percentage without regard to locale. For additional monthly discretionary charges that are assessed by Carrier on Consumers with regard to locale, Carrier shall clearly and conspicuously disclose that additional monthly fees will apply, depending on the customer's locale, and disclose the full possible range of total amounts (or percentage) or the maximum possible total amount (or percentage) of such additional monthly discretionary charges.[194]

These three carriers agreed to the AVCs' terms, demonstrating that it is not commercially impracticable for CMRS carriers to give consumers advance information about, among other things, line items. There is no reason why this Commission should not extend these requirements (and others) to the entire industry but regardless, the Commission should prohibit line items that were not mandated or authorized by a federal, state or local agency.

Finally, as NASUCA has repeatedly made clear, the restriction on carriers' regulatory line items it seeks does not foreclose all communication between carriers and their customers. If carriers want to tell their customers how much of their bill goes to funding government regulatory programs, go ahead. So long as the information is not misleading or inaccurate, NASUCA has no problem with carriers informing, even advocating to, consumers about the impact of government regulation on the industry. The only aspect of carriers' communications

[194] AVC, paragraph 18L. This is one of more than 14 disclosures these carriers must make under the terms of the AVCs, copies of which are attached to this filing. VZW, Cingular and Sprint PCS serve nearly 44 million consumers in the 32 states based on recent FCC data. *Local Telephone Competition: Status as of December 31, 2003,* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (June 2004), Table 13.

with their customers that NASUCA seeks to restrict is the one that comes with a price tag and inaccurate information.

## V. THE CARRIERS' SHIFTING TAX BURDEN ARGUMENT IS UNFOUNDED.

The United States Communications Association ("USCA") and RCA claim that NASUCA's petition unfairly shifts the burden for fees, such as gross receipt taxes, excise taxes, right of way, and property taxes, by allowing jurisdictions to export fees onto consumers who reside outside their voting districts. They suggest this jeopardizes carrier business plans based on regional and national marketing. [195] These arguments are unfounded.

For starters there is no basis to assume that such shifting does not occur under the current regime of line items. NASUCA is challenging fees that are not mandated, and therefore not scrutinized, by regulatory agencies. Carriers could be shifting their taxes now without a consumer's knowledge and there is no evidence their monthly rates do not already recover some allocated or assigned costs arising from taxes and fees from outside the customer's voting jurisdiction. The Commission has chosen to forbear from regulating CMRS carriers' rates under Section 205 of the Act and, as Nextel points out, the Commission has repeatedly forbidden state utility commissions from examining these rates.[196] There is no guarantee, therefore, that wireless and long distance carriers' rates do not already contain hidden taxes and fees.

More importantly, the commenters overlook the fact that prohibiting all line items other than those mandated or authorized by the government will allow carriers to continue including line items for mandated taxes and fees. Other line items would be treated as a company's cost of doing business and incorporated in the advertised rates or, at a minimum, aggregated and disclosed at the point of sale.

[195] USCA Comment, pp. 4, 10, 11; RCA Comment, p. 8.
[196] Nextel Comment, p. 37, Fn. 102.

USCA relies on old precedent for the proposition that surcharges are appropriate to minimize tax exportation and there is nothing to indicate that the particular decision is controlling.[197] More importantly, USCA admits that the underpinnings of the case (tariffed long distance service charges) no longer exist.[198] USCA's and RCA's tax exportation argument should not prevent the Commission from prohibiting line item surcharges that are not mandated by federal, state, or local government.

Additionally, carriers' use of line item for non-mandated fees reduces their incentive to negotiate those assessments with the agency. By granting NASUCA's petition, the Commission spurs the carriers to examine their costs more closely, increasing their competitive efficiency, which benefits consumers who pay hundreds of millions of dollars or more each year in "undocumented, uninvestigated, and unregulated 'regulatory compliance' fees."[199]

## VI. THE COMMISSION CANNOT USE THIS PROCEEDING TO PREEMPT STATE REGULATION OF CARRIER BILLING PRACTICES.

Despite Section 332(c)(3), state commissions regulate wireline carriers as to their billing information and billing practices,[200] and many states prohibit all carriers from engaging in unfair trade and deceptive advertising practices.[201] Nextel wants the Commission to preempt these state consumer protection statutes and regulations,[202] but the Commission should not follow that path.[203] Time and time again, federal courts have permitted individuals to pursue state

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[197] USCA Comments, p. 11, *citing Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990).
[198] *Id.* at 7-8.
[199] Mass. AG Comment, p. 3.
[200] *See, e.g.*, "Residential Billing and Termination Practices – Telecommunications Companies," D.P.U. 18448, Massachusetts Department of Telecommunications and Energy, available online at: http://www.mass.gov/dte/telecom/18448.pdf.
[201] See, e.g., Ohio Consumer Sales Practices Act, R.L. §§ 1345.01 et seq.; Massachusetts Consumer Protection Act, M.G.L. c. 93A, §§ 1-11; Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 et seq.; Iowa Consumers Fraud Act, Iowa Code § 714.16.
[202] Nextel comments at 31.
[203] Nextel contends that Commission should dismiss the NASUCA petition because it should have been styled as a petition for a rulemaking. Nextel comment at 28. By the same standard, Nextel's effort to persuade the Commission to pre-empt state consumer protection laws should be submitted as a Nextel petition for rulemaking, not as a comment on NASUCA's petition for declaratory relief.

jurisdictional claims over wireless companies based on state consumer protection laws.[204] It is Nextel, not NASUCA, that is blurring the distinction between rate regulation and terms and conditions regulation. NASUCA's petition clearly addresses carriers' billing and advertising, not rates, so Nextel's preemption argument fails.[205]

Apparently subscribing to the theory that "the best defense is a good offense," Nextel suggests that NASUCA's petition should be denied on, among other things, procedural grounds, but then suggests that the Commission should: (1) declare that matters regarding line items are entirely within the Commission's jurisdiction and (2) preempt states from adopting different requirements for CMRS carriers.[206] If NASUCA's petition is denied on grounds it is not the appropriate procedural vehicle to address carriers' regulatory line items under the *TIB Order*, then it is doubly inappropriate to treat Nextel's comments as a request for a declaratory ruling.

Finally, Leap suggests that the Commission's authority over CMRS carriers preempts states from imposing further restrictions regarding line items, noting that it "emphatically agrees" with NASUCA that the issue is solely the Commission's to address.[207] Leap's "agreement" is purely contrived: NASUCA does not suggest that states are preempted from addressing CMRS carriers' line items anywhere in its petition. Instead, NASUCA simply pointed out that the Commission is the body best placed to establish a nationwide standard dealing with "regulatory" line items imposed by IXCs (who usually provide interstate service) and CMRS carriers (since many states have expressly removed CMRS carriers from their utility

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[204] *Fedor*, *supra*, distinguishing *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000) (a cell tower siting / market entry case); *see also Nixon,* supra (State attorney general could pursue state claims against wireless carrier based on false advertising and billing in state court and was not preempted by Section 332); *Marcus v. AT&T Corp*., 138 F.3rd 46, 54 (2nd Cir. 1998) (Congress intended to allow claims based on deceptive business practices, false advertisement, or fraud to proceed under state law).

[205] Nextel relies heavily on *Bastien* but conveniently omits the contravening case law developments, such as *Fedor* and *Nixon*, *supra*.

[206] Nextel Comments, pp. 30-31.

[207] Leap comments, pp. 16-18.

commission's jurisdiction).[208] State commissions are not preempted from addressing IXCs' "regulatory" line items application to purely intrastate traffic and many state commissions continue to exercise jurisdiction over CMRS carriers' "other terms and conditions" of service, which may extend to line items.

## VII. IF THE COMMISSION DETERMINES THAT IT IS NOT APPROPRIATE TO ADDRESS THE ISSUES RAISED IN NASUCA'S PETITION BY MEANS OF A DECLARATORY RULING, THE COMMISSION SHOULD TREAT THE PETITION AS A REQUEST TO INITIATE A RULEMAKING.

If the Commission determines that NASUCA's petition for declaratory ruling is not the appropriate vehicle for addressing all line items not authorized by federal, state and local government, then the Commission should treat NASUCA's petition as a request to initiate a rulemaking to address those issues that fall outside the TIB docket. Based on the extensive record already developed, any such rulemaking should be undertaken expeditiously. However, as argued above, the Commission should press ahead to address the so-called "regulatory" assessment fees that are properly within the ambit of the TIB proceeding.

There should be no debate about the importance of the issues presented. No one genuinely disputes NASUCA's contention that "regulatory" line items are increasingly being used to generate revenues in the telecommunications industry. Telecommunications subscribers pay hundreds of millions of dollars a year to carriers in connection with these line items. Although there is disagreement among the commenters regarding whether, and to what degree, consumers are confused by the "regulatory" line items on their monthly bills, the record in the Commission's original TIB docket indicated substantial confusion over monthly charges. There is at least some evidence that such confusion continues over regulatory line items. Furthermore, it has been nearly six years since the original TIB proceeding and the Commission should refresh the record to see if its TIB rules are having their desired effect. The Commission should also

[208] NASUCA Petition, p. 6.

take into consideration that there was support for NASUCA's petition among a broad spectrum. Consumers and consumer protection groups filed comments in support of NASUCA's petition. Regulators – including the representative of all state commissions – filed comments in support of NASUCA's petition. And finally even some carriers filed comments supporting NASUCA's petition.

For these reasons, the Commission should not delay or dismiss NASUCA's petition on procedural grounds, but instead should deal with all issues within the scope of the TIB proceeding immediately, and treat NASUCA's petition as a request to initiate a rulemaking for all issues which may fall outside the TIB. Based on the record developed in response to NASUCA's petition, any such rulemaking should be undertaken as soon as possible.

## VIII. CONCLUSION

For the reasons set forth in NASUCA's petition, in the comments filed in response to the Public Notice, and herein, the Commission should prohibit IXCs and CMRS carriers from placing line item surcharges on their customers' bills unless (1) such charges are specifically mandated or authorized by federal, state or local law, and (2) the amount of such charges conform to the amounts authorized by government.

Respectfully submitted,

/S/
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of August, 2004, I caused true and correct copies of the foregoing *ANational Association of State Utility Consumer Advocates Reply Comments"* to be served on all parties listed below by electronic filing.

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